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CYBERDEFAMATION:
A COMPARATIVE APPROACH TO
HOW ZIMBABWE CAN ADAPT IN THE DIGITAL ERA

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DEDICATION

This is for my wife, Fadzai, and wonderful late parents, Rev. Lazarus Hungwe, whose love for education paved the way for all of us. My mum, Elester, hardworking, setting the bar for highly ethical Christian standards. To my late in-laws, Fanuel Tevere and Idzai Makotsvana, for presenting a wonderful wife and friend. May Their Soul Rest in Eternal Peace

ABSTRACT

Society has since time immemorial sought to protect the reputation of individuals and provide scope for relief to vindicate the good name of the individual. The law of defamation has evolved over the centuries, in line with technological advancements, and growing standards of decency marking the progress of a maturing world. Common law has developed in defining defamation, its test and elements, and appropriate damages. In the 9th century, a slanderers tongue could be cut as a penalty for damages. The development of the printing press in the 16th century, and radio in the 20th century, had the law reforming and adjusting to suit the technological advancements of the period. However, the development of the internet in the late 20th century has presented new significant challenges to the defamation law. The Internet is a global super-network used by millions of people the world over. This has provoked the need for a delineated legislative framework to redefine defamation law in line with technological advancements driven by the internet. This research will therefore evaluate the current state of defamation law in Zimbabwe in order to demonstrate the necessity of enacting law that adjust to the digital era, and offer protection to victims. The internet's harm to reputation has been insidious, denying victims an opportunity for employment, company closures and devastating emotional trauma associated with reputational harm.

The technological advancements have rattled the judiciary, and provoked scholars into research to provide ways in which the law could adapt and confront the emerging challenges, which had assaulted the traditional scope of defamation defining elements, publication, anonymity, jurisdictional and enforcement challenges, role of internet service providers and extent of damages. The internet has no respect for geographical boundaries, and could be used in via indeterminate routes, users, and jurisdictions. The Zimbabwean courts are yet to be confronted with complex cyber defamation related cases. The advent of the internet, is bound to present complex legal challenges for Zimbabwe's legislative framework. Internet users are over 3.3 billion in the world, and half the population in Zimbabwe use the internet, representing about 2 per cent of the population in Africa. There is need for pre-emptive scholarly research to devise ways in which Zimbabwe can adapt in the digital era. There is death of precedents to provide scope for the development of common law.

There are calls in various jurisdictions for countries to legally adapt to internet challenges, as internet communications are more ubiquitous than print and have the power to defame individuals. This research acknowledges that the law is failing to take into account changing realities technologically, and could lose credibility if the courts and scholars fail to respond applicably to changing times. Zimbabwe may face challenges of an unclear legislative frameworks, hence, this research becomes imperative.

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CHAPTER 3 DEFENCES AND REMEDIES AVAILABLE FOR DEFAMATION

ABBREVIATIONS

UNCITRAL Law	United Nations Commission on International Trade
UNCITRAL Model Laws	United Nations Convention on the Use of Electronic Communications in International Contracts
SADC ML	Electronic Transactions and Electronic Commerce SADC Model Law (SADC ML) in 2013
HIPSSA	Computer Crime and Cybercrime: SADC Model Law Harmonization of the ICT Policies in Sub-Saharan Africa project
ISPs	Internet Service Providers
MLEC: UNCITRAL	Model Law on Electronic Commerce 1996
SADC	Southern African Development Community
USA	United States of America
ICT	Information communication technologies
AU	African Union
UK	United Kingdom
CJEU	European Union Court of Justice

CHAPTER ONE

1. BACKGROUND

The law of defamation mirrors society's strong interest to safeguard, seek vindication of and or alternatively compensate harm to an individual's reputation. In the 9th century, the Laws of Alfred the Great, the King of Wessex, directed that slander was 'to be compensated with no lighter a penalty than the cutting off the slanderer's tongue.'[1] The law of defamation has developed over the centuries, with the advancement in technology accounting for its piecemeal adjustments to suit the same. In the scholarly work Gatley on Libel and Slander, defamation is defined as such: **'**A man commits the tort of defamation when he publishes to a third person words or matter containing an untrue imputation against the reputation of another.'**[2]** Gatley expands the scope of defamation to include 'statements that are to the plaintiff's discredit.'[3] The most cited formulation to defamation is borrowed from Lord Atkin in *Sim v Stretch*, where the author includes to defamation words that 'tend to lower the plaintiff in the estimation of right thinking members of society generally.'[4] This approach is buttressed in the authoritative text, *Halsbury's Law of England where it's defined as:*

> 'A defamatory statement is a statement which tends to lower a person in the estimation of the right-thinking members of the society generally or to cause him to shunned or avoid or to expose him to hatred, contempt or ridicule or to covey any an imputation on him disparaging or injuries to him in his office, profession, calling, trade or business.'[5]

The English scope of defamation meaning, is further infused into Zimbabwe's legal authoritative text by Feltoe. He describes defamation as that which 'causes harm to reputation, that is, the estimation in which a person is held by others, (his good name and standing).' [6] Feltoe adds that the statement that causes harm is one that is 'published' and 'injures' the reputation of the person whom it refers by 'lowering him in the estimation of reasonable, ordinary person generally, it diminishes his esteem or standing in the eyes of ordinary members of the general public,' and

[1]GR Smith 'Of Malice and Men: The Law of Defamation' (1992) *Valparaiso University Law Review* Val. U. L. Rev. 39 (1992), available at: https://scholar.valpo.edu/vulr/vol27/iss1/2 (Accessed 15 February 2021).
[2] C Gatley *Gatley on Libel and Slander (*1998) 4.
[3] Ibid.
[4] *Sim v Stretch* [1936] 2 All ER 1237.
[5] *Halsbury's Law of England* (2006) Vo. 28.
[6] G Feltoe *A Guide to the Zimbabwean Law of Delict* (2018) 57.

causing him to be 'shunned or avoided or may expose him to hatred, ridicule and contempt,' and this may extend to 'casting aspersions on his character, trade, business, profession or office.'[7] If the defamatory information is published, in the form of a spoken word, or sounds, looks, signs, or gestures, it is called slander.

Defamation is categorised into 'libel' and 'slander' where slander is spoken defamation whilst libel is publication in printed, or broadcasted form.[8] Where the defamatory publication befalls on the internet, for it to be measured libelous, 'the victim must prove the elements of publication, identification, defamation, fault and injury.'[9] Libel is particularly important because of its nature, it being capable of circulation through social media and internet.

While liability for publication lies with the person who communicated the offensive information,[10] or with newspapers that printed and distributed the defamatory material to a broader audience,[11] with the advent of the internet, liability has been broadened in foreign jurisdictions to include, *inter alia*, internet service providers (ISPs),[12] newspapers that publish online[13] and individuals that posts defamatory material on social media sites, such as Google[14], Facebook[15] among others. The nature and form of the internet is diverse and global, and has presented multifaceted challenges around jurisdiction,[16] identity,[17] and new definitions around publishing.[18] Disputes concerning the applicability of the multiple or single publication rule[19] have created jurisdictional issues relating to choice of law, forum shopping, and *forum non conveniences*.[20]

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[7] G Feltoe *A Guide to the Zimbabwean Law of Delict* (2018) 57.
[8] D Pember & C Calvert *Mass Media Law* (2013) 154.
[9] Iyer D 'An Analytical Look into the Concept of Online Defamation in South Africa' (2018) 32(2) *Speculum juris*
[10] *Khan v Khan* 1971 (1) RLR 134 (A).135.
[11] *Mugwadi v Dube & Others* 2014 (1) ZLR 753 (H).
[12] *Bunt v Tilley* (2007) 1 WLR 1243, para 22-23.
[13] *Garwe v ZimInd Publishers (Pvt) Ltd & Others* 2007 (2) ZLR 207 (H) 240.
[14] *Jensen v Google Netherlands* citation, quoted with approval in *Metropolitan International Schools Ltd v Designtechnica Corpn & Others* (2009) EWHC 1765 (QB) 23.
[15] *H v W* 2013 (2) SA 530 (GSJ).
[16] *Tsichlas and Another v Touchline Media (Pvt) Ltd* 2004 (2) SA 112 (W) 122.
[17] S Nel 'Online defamation : The Problem of unmasking anonymous online critics' (2007) 40(2) *The Comparative and International Law Journal of Southern Africa* 193-214.
[18] *Dow Jones & Company Inc. v Gutnick* (2002) 194 ALR 433.
[19] Ibid.
[20] *Forum non convenience* (Latin for 'an inconvenient forum') is a mostly common law legal doctrine whereby a court 'acknowledges that another forum or court is more appropriate and sends the case to such a forum. A change of venue, where another venue is more appropriate to adjudicate a matter, such as the jurisdiction within which an accident occurred and where all the witnesses reside.'

Connoly writes that the internet has not made the situation any better, compounding existing problems around jurisdictional issues.

> 'The multiple-publication rule has attracted a significant amount of criticism. It has been argued that it is unsuited to the modern world where statements can be uploaded to the internet in an instant, viewed in multiple jurisdictions, endlessly republished, and exist indefinitely if not removed. The 'chilling effect' of the rule on internet free speech is, in the view of the rule's detractors, disproportionate to the interests being protected.'[21]

There have been questions about the ability of the law to adapt in the internet age,[22] and debates around the liability of intermediaries, or ISPs[23] prompting calls for an internet international agreement.[24] The Zimbabwean courts are yet to be confronted with cyber defamation related cases that raise questions around jurisdiction, anonymous postings and liability of intermediaries. These multifaceted challenges are reason behind the 'death … (of) case law on the question of social media' both in Zimbabwe and South Africa. In Zimbabwe, courts have dealt with cyber defamation only in relation to the quantification of damages. In the case of *Mugwadi v Dube & Others*,[25] the court found as aggravating factors the accompanying extensive publication of the defamatory article on the internet, following its publication in the newspaper.

Just like in South Africa, in Zimbabwe 'there is a death … (of) case law on the question of the social media.'[26] While traditional rules of jurisdiction may be considered in cyber defamation cases, ascertaining jurisdiction is still problematic. Common challenges that arise include that of jurisdiction to prescribe, adjudicate and enforcement. Jurisdiction to prescribe refers to the right of the state to make laws, 'applicable to the activities, relations, the status of persons, or the interests of persons in thing.'[27] Jurisdiction to adjudicate refers to the power of the state to summon a defendant to appear before the court and submit him or herself to the authority of the court.

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[21] U Connolly 'Multiple publication and online defamation - recent reforms in Ireland and the UK' (2012) 6(1) *Masaryk University Journal of Law and Technology* 35-47.
[22] C Tugenhart *The law of Privacy and the Media* 3ed (2002) 135.
[23] B Reinhardt *Cyber Law: The Law of The Internet in South Africa* (2012) 200.
[24] E Smith 'Lord of the Files: International Secondary Liability for Internet Service Providers' (2012). 1588. Available at https://law2.wlu.edu/deptimages/law%20review/68-3n.23smith.pdf. (Accessed 14 October 2021).
[25] *Mugwadi v Nhari & Anorther* 2001 (1) ZLR 36 (H).
[26] *H v W* 2013 (2) SA 530 (GSJ) 9.
[27] M Saadat 'Jurisdiction and Internet After Gutnick and Yahoo!' (2005) *The Journal of Information, Law and Technology* 6, *http://www2.warwick.ac.uk/fac/soc/law2/elj/jilt/2005_1/saadat*, (Accessed 8 February 2021).

Jurisdiction to enforce refers to the enforceability of judgments on defendants who may or may not choose to be within the jurisdiction of the court. Courts of one country may not enforce judgments of a foreign state. In the complex digital era, principles of *lex loci delicti commissi*, which holds that the law of the place of the delict applies and *actor sequitur forum rei*, which states that a defendant should follow his plaintiff to his or her jurisdiction presents challenges, if issues around publication arise.

Some of these challenges have been dealt with by foreign case law. In an Australian case of *Dow Jones Inc. v Gutnick*,[28] the appellants, who were based in the United States, published an article, which contained defamatory remarks of the plaintiff, who was based in Australia. The internet version of the magazine had 55 000 international subscribers and 1 700 Australian based credit cards subscriptions. The Court had to grapple with the issue of publication. It was considered whether publication of the article took place in New Jersey where it was uploaded ('published from'), or where it was downloaded ('published into') by subscribers in Victoria, Australia. The Court held that Gutnick had a right to sue for defamation at his primary residence, and that defamation did not occur at the time of publishing, but as soon as the third party read the article. The issues around publication and jurisdiction arose in this case, which tested the relevance and appropriateness of traditional principles of defamation. The Court decided that 'publication took place where the article was viewed online, not in the country where it originated.'[29] The Gutnick case presented complex debates around the world on jurisdiction over defamatory internet content, which are likely to remain unresolved until there is harmonised international law, which sets acceptable benchmarks.[30]

The issues around jurisdiction and publication, were to later arise in the South African case of *Tsichlas and Another v Touchline Media (Pvt) Ltd*.[31] Much like in *Gutnick* publication was deemed to have taken place where the website was accessed.[32] However, Kuny AJ, opined, in *Tsichlas*, that:

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[28] *Dow Jones Inc. v Gutnick* (2002) 194 ALR 433.
[29] B Reinhardt *Cyber Law: The Law of The Internet in South Africa* (2000) 209.
[30] M Saadat 'Jurisdiction and the Internet after Gutnick and Yahoo!' (2005) *The Journal of Information, Law and Technology* , available at http://www2.warwick.ac.uk/fac/soc/law2/elj/jilt/2005_1/saadat/, (Accessed 8 February 2021)
[31] *Tsichlas and Another v Touchline Media (Pvt) Ltd* 2004 (2) SA 112 (W).
[32] Ibid.

> 'There is very little authority, certainly in South Africa, regarding the Internet and its management, administration, monitoring and, accordingly, both parties have made reference to American and Australian authorities, as well as rely upon our common law and its application to the relatively recent development of this form of electronic and almost instantaneous communication and dissemination of information on a global scale.'[33]

This problem is not isolated to South Africa alone, but Zimbabwe as well. Collier opines that 'Internet publishers find themselves before foreign courts, subject to foreign law, largely on the basis that publication occurs where material is downloaded from the internet,'[34] and that 'by a single act of placing material online, publishers arguably subject themselves to multiple legal systems.'[35] Forum shopping, which often arises, has been problematic as litigants seek for jurisdiction which would be more beneficial to their action.[36]

Where cyber defamation occurs, traditional defences are available and they are not expected to change. Such defences include, inter alia, justification,[37] fair comment,[38] truth and for the public benefit, qualified privilege,[39] confidential sources,[40] jest,[41] absolute privilege[42] and consent.[43] Just as demanded by traditional approaches, courts will not be asked to make determinations on trivial matters, as action have be 'real and substantial' to warrant the court's attention[44] and procedures in determining whether words complained of are in fact defamatory.[45]

2. PROBLEM STATEMENT

[33]Ibid.
[34] D Collier 'Freedom of expression in cyberspace: real limits in a virtual domain' (2005) *Stellenbosch Law Review* 16(1) 24.
[35] Ibid.
[36] S Papadopoulos and S Snail S 'Cyberlaw @ SA III: The Law of the Tnternet in South Africa' (2012) 208.
[37] *Levy v Modus Publications (Pvt) Ltd* 1998 (1) ZLR 229 (S).
[38] *Moyse & Others v Mujuru* 1998 (2) ZLR 353 (S).
[39] *Mugwadi v Nhari & Anorther* 2001 (1) ZLR 36 (H).
[40] Constitution of the Republic of Zimbabwe Act 20 of 2013 ('Constitution of 2013') Section 61(2).
[41] *Makova v Modus Publications* 1996 (2) ZLR 326 (H).
[42] P Mitchell *The Making of the Modern Law of Defamation* (2005) 193.
[43] *Fortune v African International Publishing* 1976 (2) RLR 223 (GD).
[44] *Yan Yuan v Attorney General* (2014) 1 SLR 793, quoted in Chan G 'Reputation and Defamatory Meaning on the Internet' (2015) 27 *SAcLJ* 703.
[45] J Burchell *The Law of Defamation South Africa* (1985) 84-86.

The advent of the internet, and its usage as a forum for the storage, publication or dissemination of information is bound to present complex legal challenges for Zimbabwe's legislative framework when dealing with matters related to cyber defamation. There are over 3.3 billion internet users in the world, with about 10 percent of these from Africa.[46] Half the population in Zimbabwe use the internet, representing about 2 percent of the population in Africa.[47] Reputations can be built and destroyed by the internet. There are calls in various jurisdictions for countries to legally adapt to internet challenges,[48] and also to address cyber defamation, as internet communications are more ubiquitous than print and have the power to defame individuals.[49] Willis J held that:

> 'The law has to take into account changing realities not only technologically but also socially or else will lose credibility in the eyes of the people. Without credibility, law loses legitimacy. If law loses legitimacy, it loses acceptance. If it loses acceptance, it loses obedience. It is imperative that the courts respond appropriately to changing times, acting cautiously and with wisdom.' [50]

Users of the internet may choose to distribute the offensive material in many different technical ways, to a wider and bigger audience. The internet era has assumed new definitions or meaning for 'publishing' which is different from the traditional delict around defamation in newspapers.[51] Another problematic issue of concern in Zimbabwe, which has arisen relates to whether to have a multiple publication rule, or single publication rule.[52] Collins opines that because of the internet 'the law has struggled to keep pace with technology'[53] in the past few years. As Collins notes, the internet is 'at the same time, a bulwark for global freedom of expression, and a medium of potentially limitless international defamation.' [54]

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[46] 'Internet Users Statistics for Africa*: Africa Internet Usage, 2020 Population Stats and Facebook Subscribers'* Available at *http://www.internetworldstats.com/stats1.htm,* [Accessed 10 October 2016].
[47] Ibid.
[48] *Tsichlas and Another v Touchline Media (Pvt) Ltd* 2004 (2) SA 112 (W) 122.
[49] L Lidsky, 'Silencing John Doe: Defamation and Discourse in Cyber space' (2000) 49 *Duke LJ* 855.
[50] *H v W* 2013 (2) SA 530 (GSJ) 31.
[51] *Tsichlas and Another v Touchline Media (Pvt) Ltd* 2004 (2) SA 112 (W) 120.
[52] *Garwe v Zimind Publishers (Pvt) Ltd & Others* 2007 (2) ZLR 207 (H)
[53] M Collins *The Law of Defamation and the Internet* (2001).
[54] Ibid.

Zimbabwe is yet to legislate on cyber defamation,[55] and has to date only drafted a Bill[56] on cybercrime, which is currently under debate.[57] In Zimbabwe courts may face challenges of unclear legislative frameworks, given that most remedies are found under the common law.[58]

There has been a mushrooming of private companies which are focused assisting law enforcement authorities to unmask anonymous individuals who make defamatory postings.[59] Online reputation management companies believe that unmasking anonymous posters is a frustrating feature of the internet that often makes it very difficult for most individuals, companies, and attorneys to implement classical legal or law enforcement solutions.[60] The validity and admissibility of information sourced by private companies in unmasking the identity of the defendants may also present huge challenges for the courts, as the area is new and technical. However, international conventions have sought to address this problem.

The United Nations Commission on International Trade Law (UNCITRAL) adopted a Model Law on Electronic Commerce (1996) with a Guide to Enactment. UNICTRAL Model Law which was established by the United Nations General Assembly seeks to adopt and regulate electronic commerce as an alternative to paper-based methods of communication and storage of information.[61] The UNICITRAL Model Law noted that it sought to establish: '… a model law facilitating use of electronic commerce that is acceptable to states with different legal, social and economic systems, could contribute significantly to the development of harmonious international economic relations.'[62]

While the Model Law seeks to facilitate economic trade with nations adapting to the digital era, some of the principles it advances seek to harmonise traditional principles around defamation with cyber digital technology. All this was in response to the fact that, '… in a number of countries

[55] Legal Resources Foundation *Index to Legislation in force in Zimbabwe, as at 31 October, 2015* Friedrich Stiftung
[56] Cyber Security and Data Protection Bill H.B, 2019.
[57] Lloyd Gumbo 'Cyber Crime Bill: The details' The Herald, 17 August 2016. Available at *http://www.herald.co.zw/cyber-crime-bill-the-details/*,([Accessed 10 October 2016).
[58] G Feltoe *A Guide to the Zimbabwean Law od Delict* (2012).
[59] Avani Singh 'Social Media and Online Defamation: Guidance from Manuel v EFF' 31 May 2019. *Available at http://www.reputation.net.in/cyber-defamation-investigation.html*, (Accessed 10 October 2016).
[60] Jennifer Bridges 'How to deal with online defamation' 17 June 2019. *https://www.reputationdefender.com/blog/orm/how-to-deal-with-online-defamation*, (Accessed 8 Febraury 2020).
[61] UNICITRAL Model Law on Electronic Commerce with Guide to Enactment 1996.
[62] Ibid.

the existing legislation governing communication and storage of information is inadequate or outdated because it does not contemplate use of electronic commerce.'[63] The idea behind the Model Law is, according to the concept, not to encourage 'wholesale removal of the paper-based requirement, or disturbing the legal concepts and approaches underlying those requirements.' [64] Instead, it contemplates providing a complimentary role to existing paper-based rules for evidential purposes, though it also seeks to validate transactions that are executed by information communication technologies.

Article 5 of the Model Law embodies the principle that data messages 'should not be discriminated against… that there should be no disparity of treatment between data messages and paper documents. It is intended to apply notwithstanding any statutory requirements for writing or originality. It cannot be denied legal effectiveness, or validity or enforceability solely on the basis that it's a data message.'[65]

The significance of having countries adapting and embracing information technology data messages is part of the Model Law recommendation which seeks to review the legal rules affecting the use of computer records as evidence in litigation in order to eliminate unnecessary obstacles to their admission and to be assured that rules are consistent with developments in technology, and to provide appropriate means for a court to evaluate the credibility of the data contained in those records.' [66] There was also a realisation that in many countries existing legislation 'governing communication and storage of information is inadequate or outdated because it does not contemplate use of electronic commerce.'[67] The current legislative framework in Zimbabwe, cannot adequately cater for developments in the digital era, and may have difficulties dealing with cyber defamation, hence the latest approaches aiming at drafting the Cyber Security and Data Protection Bill.[68]

[63] UNICITRAL Model Law on Electronic Commerce with Guide to Enactment 1996 16.
[64] UNICITRAL. 20.
[65] UNICITRAL 31.
[66] UNICITRAL 65.
[67]UNICITRAL 16.
[68] Cyber Security and Data Protection Bill H.B, 2019.

One fundamental principle that arises under UNICITRAL Model Law is the principle of functional equivalence.[69] The background to the development of the principle is that states, ought to adapt their legislation to developments in communication technology without, '… wholesale removal of the paper-based requirements themselves or disturbing the legal concepts and approaches underlying those requirements.'[70] The principle seeks to fulfil the purposes and functions of the traditional paper-based approach in an electronic based technique. Data messages are meant to enjoy the same level of recognition as paper-based, even though they may not carry important aspects for evidential purposes such as signatures, writing and originality. When using electronic based communication for evidential purposes, even in civil proceedings, if the offending material does not contain a signature, is not in written form. It can be as binding to the authors if the functional equivalence rule is applied. UNICITRAL notes that courts in different jurisdictions, may adopt the Model Law, and enact it as part of their body of legislation, but it ought to be 'interpreted in reference to its international origin in order to ensure uniformity" in its interpretation by various countries.'[71]

The Convention on Cybercrime,[72] also known as the Budapest Convention was the first treaty to make an attempt at addressing crimes committed through the internet. While the convention principles apply to the criminal usage of the internet and violations of network security, more importantly, it enlists various powers and procedures aimed at searching computer networks and lawful interception. Its main focus is however to pursue a 'common criminal policy aimed at the protection of society against cybercrime, especially by adopting appropriate legislation and fostering international cooperation,' and, 'Providing for domestic criminal procedural law powers necessary for the investigation and prosecution of such offences as well as other offences committed by means of a computer system or evidence in relation to which is in electronic form.'[73]

The targeted offences in the Budapest Convention related to, inter alia, 'illegal access, illegal interception, data interference, system interference, misuse of devices, computer-related

[69] Ibid.
[70] Ibid.
[71] Ibid.
[72] Convention on cybercrime, Budapest, 23.X1.2001.
[73] Ibid.

forgery, computer-related fraud, offences related to child pornography, and offences related to copyright and neighbouring rights.'[74]

While the convention seeks to address criminal matters, it can be argued that organisations should or can be subpoenaed to provide critical evidence, where evidence obtained in a criminal proceeding, is to be used in civil proceedings, and it arises out of communication in a computer system between parties in different jurisdictions. Even if the evidence is in electronic form, the Budapest Convention, just like the UNICITRAL Model Law on Electronic Commerce, seeks to validate it and give it effectiveness.

There are however similarities in approach to current common law positions in relation to jurisdiction. Article 22 of the Budapest Convention seeks to establish jurisdiction where an offence has been committed in its territory', 'by any of its nationals, if the offence is punishable under criminal law where it was committed or if the offence is committed outside the territorial jurisdiction of any state.'[75]

While the treaty specifically addresses criminal matters, there are principles that can be adopted from the convention and adapted to suit civilly actionable matters related to cyber defamation. There can be cooperation amongst states for information needed in civil cases for evidential purposes. Aspects on jurisdiction, where if the offensive or contentious information was written in a foreign jurisdiction, but downloaded in another, or published there, jurisdiction can be established.

The incorporation of UNCITRAL Model Law on ecommerce, and the Budapest Convention on Cybercrime,[76] provides a general framework for the development of common law, with its principle of functional equivalence. Some of the principles could be adopted and adapted to provide favourable and workable legislative framework that conforms to the new nature and forms of the digital era. Similar principles have been adapted into regional computer related model law. An example of this is the Southern African Development Community Model Law on

[74] Section 16 Cyber Crime Offences, Convention on Cybercrime
[75] Convention on cybercrime, Budapest,23.X1.2001 Article 22.
[76] Convention on Cyber Crime, Budapest, 23.X1.2001.

Computer Crime and Cybercrime (SADC Model Law), which also sought to harmonise ICT polices in sub-Saharan Africa.[77] The SADC Model Law states that 'the fact that evidence has been generated from a computer system does not by itself prevent that evidence from being admissible.[78]

It is submitted that the liability of ISP's in Zimbabwe should also be debated in line with international precedents[79] and the principle of functional equivalence proffered under international model laws.[80] Questions will always arise on whether the definition around publisher and publishing be broadened to include ISPs where online defamation litigation arises, or should courts stick with the traditional definitions, and whether ISPs can be held liable where anonymous person post defamatory material. It is argued that reliance can be placed on the international model laws. Given that Zimbabwean defamation law is traditionally heavily influenced by the United Kingdom, (hereinafter 'UK') [81] this thesis analyses the position in that jurisdiction with reference to its Defamation Act,[82] and how it has adjusted its legislative framework adapting to the digital era.[83] The Defamation Act, which was gazetted in April 2013, dictates what internet service providers should do to escape liability, after being alerted to defamatory comments on their sites. Before it received Royal Assent, Lord McNally, indicated before the Grand Committee of the House of Lords, that he believed that the 'Process established by the regulations strikes a fair balance between freedom of expression and the protection of reputation and between the interests of all those involved, and that it will provide a useful and effective means of helping to resolve disputes over online material.'[84]

Questions will always arise on how the law can deal with unmasking anonymous internet sources that defame individuals or juristic artificial persons and the extent to which ISPs can be held liable for defamatory material posted on their sites.

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[77] HIPSSA- Computer Crime and cybercrime; SADC Model Law 13.
[78] Ibid.
[79] *Metropolitan International Schools Ltd v Designtechnica Corpn & Others* (2009) EWHC 1765 (QB).
[80] UNCITRAL Model Law on Electronic Commerce with Guide to Enactment 1996 24.
[81] Feltoe G *A Guide to the Zimbabwean Law od Delict* (2018) 57.
[82] Defamation Act 2013 c26.
[83] J Price *Blackstone's Guide to The Defamation Act*, 2013 (2013).
[84] UK defamation law reforms take effect from start of 2014 *Available at http://www.theregister.co.uk/2013/11/21/uk defamation law reforms take effect from start of 2014/* (Accessed 12 January, 2016).

Section 5 of the Defamation Act,[85] provides comprehensive guidelines on defences available to operators of websites, in the event of a lawsuit, for material posted online. For instance, section 5(2) states that 'it's a defence for the operator to show that it was not the operator who posted the statement on the website.'[86] However, the defence fails if the claimant shows that: 'it was not possible for the claimant to identify the person who posted the statement,…the claimant gave the operator a notice of complaint in relation to the statement, and operator failed to respond to the notice of complaint in accordance with any provision contained in regulations.'[87] Regulations may make 'provision as to the action required to be taken by an operator of a website in response to a notice of complaint (which may in particular include action relating to the identity or contact details of the person who posted the statement and action relating to its removal and make provision specifying a time limit for the taking of any such action.'[88] Such guidelines, are important in developing laws around cyber defamation and can be adopted and adapted.

The thesis will analyse the effects of precedents around cyber defamation, in various jurisdictions, particularly the Australian case of *Dow Jones Inc. v Gutnick*[89] and how it shaped various traditional principles around jurisdiction and publishing in the digital era. The *Gutnick* case helps illuminate the complexities of various developing principles around cyber defamation, particularly jurisdiction and publishing.

South Africa has adopted the common law position on cyber defamation, whose influence continue to shape how the judiciary resolve defamation related cases on jurisdiction, publishing and liability of different parties which include among others, ISPs or intermediaries.[90] It has legislation around internet defamation, particularly The Electronic Communications Act,[91] which regulates ISPs, and their liability for posting defamatory material.[92] Zimbabwe, may adopt the same legislative approach, which is in line with international precedents in the United Kingdom, to craft internet legislation that regulates its use. Lessons may be learnt from South Africa,

[85] Defamation Act 2013 Available at http://www.legislation.gov.uk/ukpga/2013/26/contents/enacted Accessed 8 February 2021.
[86] Ibid.
[87] Ibid.
[88] Ibid.
[89] *Dow Jones & Company Inc. v Gutnick* [2002] HCA 56.
[90] *Tsichlas and Another v Touchline Media (Pvt) Ltd* 2004 (2) SA 112 (W) 122.
[91] The Electronic Communications and Transactions Act No 25 of 2002.
[92] Ibid.

particularly on addressing the liabilities of ISPs, obligations to reveal the identities of people that post defamatory material, and disclaimers to limit liability for defamatory material. The point of reference can be made to international model convention laws which are discussed above. While South Africa is signatory to relevant conventions, like EU Convention on Cybercrime,[93] which helps develop jurisprudence and adaptation to data messages, it is the regional neighbour of Zimbabwe, which this research is focused on and which hasn't signed the same conventions. The opportunities and obstacles of Zimbabwe following suit in ratifying such conventions will be analysed and recommendations made on why ratification is necessary.

3. RATIONALE AND SIGNIFICANCE OF THE STUDY

The advent and growth of the internet has created immense tensions around rights of privacy and expression.[94] Willis J noted that social media has 'created tensions for these rights in ways that could not have been foreseen by the Roman emperor Justinian's legal team.' [95] He further added that it was not the:

> "duty of the courts to harmoniously develop the common law in accordance with the principles held in the Constitution, as the pace of the march of technological progress has quickened to the extent that the social changes that result therefrom require high levels of skill not only from the courts, which must respond appropriately, but also from lawyers."[96]

It is submitted that there is a need to redefine Zimbabwean laws, in relation to internet defamatory postings by adopting from international[97] and regional model laws.[98] There is also need to determine the extent to which internet service providers can be held liable for material posted by others users. The quantification of damages, the determination of audience reached and aspects of jurisdiction,[99] especially insofar as they relate to foreign parties will have to be considered. Definitions around publication or publishing that have been determined in different jurisdictions

[93] S Papadopoulos & S Snail *Cyber Law The Law of the Internet in South Africa (*2004) 216.
[94] *Tsichlas and Another v Touchline Media (Pvt) Ltd* 2004 (2) SA 112 (W) 122.
[95] *H v W* (2013 (2) SA 530 (GSJ) 6.
[96] Ibid. 7.
[97] UNCITRAL Model Law on Electronic Commerce with Guide to Enactment 1996.
[98] Establishment of Harmonised Policies for the ICT market in the ACP countries; Computer Crime and Cybercrime ; SADC Model Law.
[99] *Casino Enterprises (PVT) Ltd (Swaziland) v Gauteng Gambling Board*, Unreported, Case No.28704/04.

such as in the Australian case of, *Gutnick,*[100] and the South African case of *Tsichlas v Touch Line Media (Pty) Ltd*,[101] provide authoritative positions on the said definitions in the digital era which can help guide Zimbabwean courts. Still to be defined, are the applicability of single publication rules and the multiple publication rules. The single publication rule refers to 'all publications of the offending material being held as 'one publication.'[102] The Multiple publication rule, refers to different publications, arising from the same issue, attracting different lawsuits in various jurisdictions.[103] In the case of *Loutchansky v The Times Newspapers Limited*,[104] the courts rejected the single publication rule, creating concerns and anxiety amongst many newspapers.

Of late in Zimbabwe, there has been a rise in litigation related to cybercrime not specifically defamation.[105] The state has met numerous roadblocks in investigating cyber-criminal defamation cases, where offensive material has been posted in the social media with the identity of the poster being anonymous.[106] Accused persons have been arrested on mere suspicion, and evidence has been difficult to unearth under the cover of internet anonymity.[107] The same challenges may arise in civil actions that relate to cyber defamation.

In Zimbabwe, law enforcement authorities have relied on evidence supplied by information technology experts, whose knowledge is often beyond the grasp of the courts.[108] Verifying the authenticity or credibility of such evidence is difficult for the courts, as it would require wide corroboration. What is clearly absent are guidelines in the evidential verification process that would meet professional and acceptable standards in the administration of justice. [109]

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[100] *Dow Jones & Company Inc. v Gutnick* [2002] HCA 56.
[101] *Tsichlas v Touch Line Media (Pty) Ltd 2004* (*2*) *SA 112* (*W*).
[102] A Russell & M Smillie 'Freedom of Expression –v- The Multiple Publication Rule' (2005) *The Journal of Information, Law and Technology* Available at *http://www2.warwick.ac.uk/fac/soc/law2/elj/jilt/2005_1/russellandsmillie/*> ,([Accessed 8 February 2021).
[103] Ibid.
[104] *Loutchansky v The Times Newspapers Limited* 2001 EWCA Civ 1805.
[105] *State v Edmund Kudzai* Unreported criminal case B682/14.
[106]Tendai Rupapa 'Baba Jukwa probe: Makedenge in the United States' *The Herald* 4 October 2014 Available at *http://www.herald.co.zw/baba-jukwa-probe-makedenge-in-the-united-states/*, [Accessed on 11 October 2016).
[107] The Zimbabwe Situation 'Zim never consulted Google, Facebook over Baba Jukwa' 14 October 2015 Available at, *http://www.zimbabwesituation.com/news/zimsit_w_zim-never-consulted-google-facebook-over-baba-jukwa-the-zimbabwean/*, (Accessed 11 October 2016).
[108] Ibid (note 105 above).
[109]Gift Phiri 'Zimbabwe needs fresh cyberbullying laws' 25 August 2014 http://www.zimbabwesituation.com/news/zimsit_w_zim-needs-fresh-cyber-bullying-laws-dailynews-live/ (Accessed 10 October 2016).

4. AIMS OF RESEARCH

The author seeks to make proposals on how the current legislative framework in Zimbabwe can adapt to the advent of the digital era by adopting relevant legislation of foreign jurisdictions that have helped the courts in adjudicating cases of cyber defamation.

There is need to revisit international model laws on cyber law, argue on their applicability and adaption and adoption in Zimbabwe. Cyber defamation is increasingly occurring on forums that are largely unregulated creating difficulties around balancing the right to reputational protection and freedom of expression. There is a need to create legal buffers that can adapt to such legal challenges should they emerge in future. Scholars and Law Reform Commissions agreed on this pre-emptive approach to the foreseeable legal challenges.

5. METHODOLOGY

Scholarly contributions on cyber defamation will be analysed. Precedents or case laws, international model laws and relevant legislation of various jurisdictions will also be analysed and compared with the position in Zimbabwe. Flowing from this will be recommendations for reform. The three jurisdictions to be used for comparative analysis are the UK, United States (hereinafter 'US') and South Africa. UK colonised Zimbabwe towards the end of the 19th century. The UK's legal influence has been immense with the adoption of its common law, which has permeated and shaped Zimbabwe's jurisprudence.[110] The UK is one of Zimbabwe's top five biggest trading partners, with South Africa being included in the list.[111] South African common law is derived from the old 17th and 18th centuries Roman-Dutch law delivered to the Cape.[112] This forms the

[110] O Saki and T Chiware 'The Law in Zimbabwe' (2007) *Hauser Global Law School Program, New York University School of Law* Available at https://www.nyulawglobal.org/globalex/Zimbabwe.html, (Accessed 8 February 2021).
[111] Zimbabwe top 5 Export and Import partners World Integrated Trade Solution Available at https://wits.worldbank.org/countrysnapshot/en/ZWE, (Accessed 8 February 2021).
[112] Ibid.

basis of modern South African law and has binding authority. The United Sate gave birth to the internet.[113] Its legislative reforms are important for Zimbabwe to draw lessons from. Its jurisprudence has significantly adapted to internet developments. The US is also in Zimbabwe's main top 20 exports.[114]

6. CHAPTER OUTLINE

Chapter 1

Introduction and background. Law of defamation and how it has evolved over the years. Problem statements, Research methodology, objectives, and a synopsis of chapters.

Chapter 2

This chapter will focus on the history of defamation and the Zimbabwean Law of Defamation and its elements**.** It will also focus on the challenges courts have faced in dealing with cyber defamation, complex problems that have arisen with the development of the internet age, and how the courts have attempted to adapt. Jurisdiction, anonymity, single publication rule and quantum of damages.

Chapter 3

This chapter will discuss defences and remedies available to a defendant or respondent following an action for defamation. There are several defences and remedies available and each will be activated depending on the circumstances surrounding the facts of the alleged defamation.

Chapter 4

This chapter will provide an analysis of International Model Law conventions around cyber laws, particularly the UNICITRAL Model Law, European Union Budapest Convention, and SADC

[113] Countryaagh.Com 'Zimbabwe Major Trade Partners' Zimbabwe Major Exports, June 2019 Available at *https://www.countryaah.com/zimbabwe-major-trade-partners/,* [Accessed 8 February 2021].
[114] History of the Internet Available at *https://en.wikipedia.org/wiki/History_of_the_Internet,* (Accessed 8 February 2021).

Model Laws as they have developed various principles that can be adopted and adapted. It will also give an overview of how the United Nations and other regional bodies have responded through the creation of model laws to the exponential growth of internet usage, the legal implications that have created a legislative lacuna. Focus will be on the UNICITRAL E-Commerce Model Law, The Convention on Cybercrime, also known as the Budapest Convention Harmonization of the ICT Policies in Sub-Saharan Africa project and The SADC Model Law on Computer Crime and Cyber Crime.

Chapter 5

This chapter seeks to draw comparisons between United Kingdom, United States and South Africa, which are in three different continents. The chapter will focus on their statutory and common law approaches to addressing the legal problems associated with the rapid growth of the internet into a worldwide web of computer networks.

Chapter 6

Recommendations and conclusion of the research.

CHAPTER TWO

A BRIEF HISTORY OF DEFAMATION LAW AND THE ZIMBABWEAN LAW OF DEFAMATION

2.1 INTRODUCTION

This chapter will discuss the history of defamation law and the Zimbabwean law of defamation. English law has a significance impact on Zimbabwe law and the law of defamation. Roman-Dutch law forms a significant part of Zimbabwe's and South Africa's common law. This chapter will try to provide the framework for the law of defamation in Zimbabwe and the elements of defamation, delineating critical issues that can be raised for a successful action or defence. The laws of defamation seek to protect an individual's right to an undamaged reputation. Most importantly, his or her good name. This chapter will propose and provide a framework of a clear legislation that addresses the challenges posed by the digital era. While cognisance should be taken of the need for the development of domestic laws it is imperative to consider the general outline of the constitutional and common law structure of the law of defamation in Zimbabwe.

2.2. A BRIEF HISTORY OF DEFAMATION LAW

The 9th century provided for punishment of slander which occurred by way of harshly removing the source of the problem – the slanderer's tongue.[115] Humankind has sought reprisals or compensation for defamation over the years. Zimbabwe's common law of defamation was cultivated and developed through English jurisprudence. For England, the history of protecting reputation evolved in the spiritual sphere of the ecclesiastical courts, Royal courts and the Star Chamber. The ecclesiastical courts held a distinct and profound jurisdiction over defamation. The church dealt with matters of defamation from their inception in the times of William the Conqueror, based on the biblical mandate, 'you shall not bear false witness against your neighbour.'[116] Furthermore defamation was regarded as a sin.[117] Defamation, being a sin,

[115] P George *Defamation Law in Australia* (2017) quoting *Villers v Monsley* (1769) 2 Wils KB 403; 95 ER 886.
[116] Ibid.
[117] V Veeder 'The History and Theory of the Law of Defamation' (1903) 3(8) *Columbia Law Review* 546-573.

committed by a sinner, and treated as a spiritual offence, the ecclesiastical courts 'could impose punishments of penance for the salvation of the sinner.'[118]

In 1222, the Council of Oxford enacted a constitution based on the Canons of the Fourth Lateran Council which decreed that 'whoever would maliciously impute a crime to any person who is not of ill fame among good and serious men would be excommunicated.'[119] Over the years, ecclesiastical courts came to have an established jurisdiction over defamation, as the 'Church was concerned with the purity of the souls of its flock, and defamation was treated as a spiritual offence, and the ecclesiastical courts could impose punishments of penance for the salvation of the sinner.'[120] With time, the church lost its jurisdiction to the royal courts, which became the major forum for defamation actions. Damages, though in the historical development of defamation were initially harsh, and unpalatable, monetary penalties for defamatory words provided a remedy for those wronged.

In his speech on the history of defamation, Bathhust,[121] provided an entertaining example, from Roman Times, of a rich citizen named Veratius, who would insult others as he walked through the city and 'pre-emptively to save time, a servant would walk behind him, paying the required fine to those he had insulted … (and) the payment of damages had less consequence for those with deep pockets.'[122] Of importance to the church, for the wrong done, was penance and repentance from the sinner rather than reparation for the victim. In extreme circumstances, excommunication would suffice. Punishment of public shaming as reparation could be applied and involved the offender walking around the church holding a candle. [123]

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[118] R H Helmholz, 'Crime, Compurgation and the Courts of the Medieval Church' (1983) 1(1) *Law and History Review* 1-13.

[119] R H Helmholz, 'Canonical Defamation in Medieval England' (1971) 15 *American Journal of Legal History* 255-256.

[120] The Hon T F Bathurst Chief Justice of New South Wales Francis Forbes Society Legal History Tutorials 'The History of Defamation Law: Unjumbling a Tangled Web' (2020), Available at *https://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2020%20Speeches/Bathurst_202 01008.pdf, (*Accessed 17 February 2021].

[121] The Hon T F Bathurst Chief Justice of New South Wales Francis Forbes Society Legal History Tutorials 'The History of Defamation Law: Unjumbling a Tangled Web' (2020). Available at *https://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2020%20Speeches/Bathurst 202 01008.pdf*, (Accessed on 17 February 2021).

[122] Ibid.

[123] Ibid.

Buthurst the jurist observed that long before the internet, laws related to defamation developed in response to innovations and what were then novel forms of expression.[124] In the 15th century, printing press as a new technology posed a greater threat to existing defamation laws. The response of the establishment was censorship in the 16th century, which required licensing of the printing press. Elizabeth I decreed that anyone in possession of 'wicked and seditious' books would be executed.[125] Some technological development occurred with the production of radio, in the 20th century, raising legal questions on the classification of radio comments as either slander or libel, bringing questions on whether comments made on a radio broadcast slander or libel.[126] It was later held in *Meldrum v Australian Broadcasting Co Ltd* [127] that a defamatory material broadcast was a slander, and eventually, through the Broadcasting Act of 1956,[128] the transmission of words by a radio or television station was publication in a permanent form.

Jurists have observed that the advent of the internet has 'shaken up the realm of defamatory possibilities.'[129] Bathurst, notes that 'whereas in bygone days a defamatory comment or written remark was more likely to stay within a community, such remarks now have the capacity to be circulated virtually instantaneously on a global scale. The speed at which the internet has advanced is also remarkable.'[130] The Judge foresaw the difficulties emanating from the internet, in the context that 'the social media age has brought its own specific set of troubles, some of which the amendments to the uniform laws are seeking to remedy substantial number of defamation claims that relate to posts or comments on forums such as Facebook and Twitter, and even emojis can have defamatory meaning.'[131]

2.3. INTRODUCTION TO THE ZIMBABWEAN LAW OF DEFAMATION

[124] Ibid.
[125] P George *Defamation Law in Australia* (2017) 19.
[126] M Lunney *A History of Australian Tort Law 1901-1945* (2018) 32.
[127] *Meldrum v Australian Broadcasting Co Ltd* [1932] VLR 425.
[128] Broadcasting and Television Act, of 1956. It is no longer in force in Australia.
[129] Bathhurst (note 6 above).
[130] Ibid.
[131] Ibid.

English law has considerably influenced Zimbabwe's law of defamation. The common law of Zimbabwe is primarily the Roman-Dutch Law as applied at the Cape of Good Hope on the 10 June 1891 unless it has been limited, abolished or regulated by statute.[132] Zimbabwe's common law defamation has also been greatly influenced by both English[133] and South African[134] precedents. While the Courts have consistently followed traditional common law defamation principles, there are judgments that have been passed that take due considerations of the advent and effect of the internet.[135]

The previous chapter has set out the abstract, providing the architecture of the research and how it will progress. This chapter will seek to provide the framework for the law of defamation in Zimbabwe, outlining the elements to be raised for successful litigation. Online defamation has not spared the country, and the judiciary is seized with frequent litigation surrounding offending social media publications.

Defamation entails the intentional infringement of another person's right to his good name. To elaborate, defamation is the 'wrongful, intentional publication of words or behaviour concerning another person which has the effect of injuring his status, good name or reputation.'[136] Internet related defamation is held to be 'the act of defaming, insulting, offending or otherwise causing harm through false statements pertaining to an individual in cyberspace.'[137] The right to a good name or fama, is recognised as an independent personality right.[138] Therefore, the purpose of the law of defamation 'seeks to protect a person's right to an unimpaired reputation or good name against any unjust attack.'[139]

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[132] Constitution of Zimbabwe (Amendment No.20) 2013, section 192.
[133] *Khan v Khan* 1971 (1) RLR 134.
[134] Ibid (note 1 above; 1); Lewis AJP held that both English and South African precedents supported awarding of damages on a higher scale in appropriate cases taking into consideration the seriousness of the defamatory remarks and conduct of the defendant up to judgment.
[135] *Mugwadi v Dube* 2014(1) ZLR 753 (H) 779, where in the Court held: "It is my view that, in order to keep up with current trends, the court should seriously consider the effect that social media like face book, WhatsApp, Twitter and Instagram now has on the extent of the publication, for purposes of assessing the quantum of damages. There was evidence in this case that people as far away as America and the United Kingdom, read the article that was published almost at the same time as the plaintiff's family, because the Sunday Mail is now published online."
[136] Neethling et al *Law of Delict* 7 ed (2015) 352.
[137] K Kashyap 'Defamation in the Internet Age: Law and Issues in India' (2016) *International Journal for Innovation in Engineering Management and Technology* 18.
[138] *Khan v Khan* (note 1 above; 352)
[139] M Loubser & R Midgley *The Law of Delict in South Africa* (2012) 340.

Neighboring South Africa is confronted with growing statistics in online defamation accompanied by concomitant demands that it should develop a regulatory framework that addresses the internet's technical complex nature. Iyer writes that:

> 'The fact that South Africa seems to be lagging behind other countries in formulating a clear legislative framework to deal with online defamation cases warrants general concern. The relatively low cost of connecting to the internet coupled with emergent knowledge and reliance on this virtual medium has created the opportunity for online defamation to increase exponentially … Worldwide, people appear to be ignorant of the dangers in posting harmful or degrading comments about others on social media and it has become clear that the internet has made it challenging to regulate defamation.'[140]

It appears the main challenges relating to internet defamation is the absence of a clear coherent set out legislative parameters and bounderies. Sanet writes that there is little jurisprudence dealing with the internet and 'what is abundantly clear, is that some form of national and international regulation is necessary to prevent this global network's potential legal problems from getting out of hand.'[141]

Therefore, it becomes imperative for Zimbabwe to develop and delineate a certain and coherent legislative framework that addresses challenges posed by the developments in the digital era. There is therefore a need in this chapter to present the current traditional common law framework and its elements as it relates to Zimbabwe, before addressing the defences and remedies available for defamation in the chapter that follows. While cognisance should be taken of the need to develop domestic laws, it is important to provide the general overview of the constitutional and traditional common law structure of the law of defamation in Zimbabwe.

2.2.1. Constitutional framework for free speech

[140] Iyer D 'An Analytical Look into the Concept of Online Defamation in South Africa' (2018) *Speculum juris* 32(2)
[141] S Nel 'Defamation on the Internet and other computer networks' *Comparative and International Law Journal of Southern Africa*, (199730(2)154–174.

Section 61 of the Constitution of Zimbabwe[142] explicitly provides for freedom of expression and media but does not expressly protect reputational damage. The provisions are relevant in balancing competing reputational interests and freedom of expression. It can be safely argued that the right to fama, or reputation, is subsumed by the right to dignity, which is specifically provided under section 51 of the Constitution.[143] The essence of an individual's dignity, speaks to an inherent reputational interest. Burchell asserts that 'while the concept of 'dignity connotes self-esteem' and reputation the 'estimation of others' … the concept of dignity is wide enough to include reputation.'[144] However, these rights can be limited in terms of section 86 of the Constitution and this would apply to the extent that the limitation 'is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom, taking into account all relevant factors.'[145] The relevant factors would ordinarily include,

> (a) the nature of the right or freedom concerned;
>
> (b) the purpose of the limitation, in particular whether it is necessary in the interests of defence, public safety, public order, public morality,
>
> (c.) the nature and extent of the limitation;
>
> (d.) the need to ensure that the enjoyment of rights and freedoms by any person does not prejudice the rights and freedoms of others;
>
> (e.) the relationship between the limitation and its purpose, in particular whether it imposes greater restrictions on the right or freedom concerned than are necessary to achieve its purpose; and
>
> (f.) whether there are any less restrictive means of achieving the purpose of the limitation.[146]

[142] Constitution of Zimbabwe (Amendment No. 20), 2013, section 61(1). Every person has the right to freedom of expression, which includes: -
a) freedom to seek, receive and communicate ideas and other information.
b) freedom of artistic expression and scientific research and creativity; and
c) academic freedom
(2). Every person is entitled to freedom of the media, which freedom includes protection of the confidentiality of journalists' sources of information.

[143] Constitution of Zimbabwe Section 51. The right to human dignity. Every person has inherent dignity in their private and public life, and the right to have that dignity respected and protected.

[144] J Burchell *Personality Rights and Freedom of Expression*: *The Morden Actio Injuriarum* (1998) 139.

[145] Section 86 of the Constitution of Zimbabwe, 2013.

[146] Ibid.

Scholars support the need for balancing the right to fama, and free speech. Feltoe writes that if the law leans too heavily in favour of 'protecting reputational interests, freedom of expression will be unduly curtailed. But if the law gives too much latitude to those seeking to exercise their right to freedom of expression, then there is the danger that reputational interests will be inadequately protected.'[147] Courts in Zimbabwe generally tend to lean more towards protection of reputational harm, than the freedom of the press and expression.[148] Zimbabwe's common law is a progeny of the United Kingdom defamation laws, which are also perceived less plaintiff friendly.

2.3. THE ELEMENTS OF A DEFAMATION ACTION

In *Khumalo and Others v Holomisa*[149] the Court stated that the elements of defamation are:

(a) The wrongful and
(b) Intentional
(c) Publication of
(d) A defamatory statement
(e) Concerning the plaintiff

These elements are also raised in various Zimbabwean court judgments[150] and by various legal scholars. Burchell defines defamation elements as encompassing the unlawful, intentional, publication of defamatory matter, by words or conduct, referring to the plaintiff, which causes his reputation to be impaired. [151] Neethlings also raises the same elements, which would include the 'intentional infringement of another's right to his good name, or, more comprehensively, the wrongful, intentional publication of words or behaviour concerning another which has the tendency to undermine his status or reputation.'[152] From these definitions, it becomes clear that for defamation to arise, there has to be factual violation of an individual's fama, arising from the

[147] G Feltoe 'The Press and the Law of Defamation : Achieving a Better Balance' (1993). 43. *Legal Forum* Vol 5, No 2..
[148] *Shamuyarira v Zimbabwe Newspapers (1980) Ltd* 1994 (1) ZLR 445 (H).
[149] *Khumalo and Others v Holomisa* 2002 5 SA 401 (CC).
[150] *Shamuyarira v Zimpapers Newspapers (1980) Ltd* 194 (1) ZLR 445 (H).
[151] J Burchell *The law of Defamation in South Africa* (1985) 35.
[152] J Neethling *Neethling's Law of Personality* (2015) 352.

combined elements of intention, wrongfulness, publication or communication, by words or conduct, to one or more persons, other than the plaintiff.[153]

In Zimbabwe, the plaintiff has to allege and prove publication of defamatory material, that it referred to or concerned him or her.[154] Feltoe writes that for a publication to be defamatory, it must result in a person being 'shunned, or avoided, or may expose him to hatred, ridicule or contempt … (the person) may be defamed by casting aspersions on his character, trade, business, profession or office.'[155] The plaintiff must set out and present the words used in the publication and prove that they were defamatory. Where the words have been spoken, it is not necessary to provide the exact words used.[156] The plaintiff, after setting out the words used, must prove that the statement was false, published to more than one person and harmed his or her reputation.

It then becomes a question of law, whether or not the words alleged are reasonably capable of conveying the defamatory meaning, through the objective test, using interpretation of an ordinary reader, of average intelligence.[157]

As stated earlier, words published must ordinarily result in the plaintiff being shunned or avoided, exposed to hatred, ridicule or contempt. The forgoing defamatory aspects were referred to in *Velempini v Engineering Services Department Workers Committee for City of Bulawayo & Others*.[158] What this aspects illustrates is that defamed person must be adversely affected in his character and or profession.[159] It is also possible for artificial persons to be defamed or hurt in their trade or business and seek damages.[160]

Defamation in Zimbabwe can take the form of either slander or libel. Libel is the publication of defamatory material in the form of writing or broadcasting. Slander as distinguished

[153] M Loubster and R Migley *The Law of Delict in South Africa* (2017) 343.
[154] *Mohadi v Standard Press Pvt Ltd* 2013 (1) ZLR 31 (H).
[155] G Feltoe *A Guide to the Zimbabwean Law of Delict* (2014).
[156] *Khan v Khan* 1971 (1) RLR (H) at 134.
[157] *Chinamasa v Jongwe P & P (Pvt) Ltd and Another* 1994 (1) ZLR 133 (H) at 153.
[158] *Velempini v Engineering Services Department Workers Committee for City of Bulawayo & Others* 1988 (2) ZLR 173 (HC) 178.
[159] *Zvobgo v Modus Publications (pvt) Ltd* 1995 (2) ZLR 96 (H) 112.
[160] *Schweppes v Zimpapers (1980) Ltd* 1987 (1) ZLR 114 (HC) 115.

from libel, is seen as spoken defamatory publication. A person can also be defamed through gestures, cartoons, or a piece of art or caricature and this will fall under slander.[161] The test for defamation and the applicable defences are the same in both forms. Libel and slander are communications that falsely debase someone's character. The difference between the two terms lies in how the information is transmitted to the public. However, the common law requirements for defamation do not make a distinction between libel and slander. A relevant slander case in Zimbabwe was considered by the courts in *Mohammed v Kassim*,[162] where a verbal defamatory statement was published to an audience.

The law of defamation coming in either libel or slander, entails two competing interests that often present a tough balancing act, the right to reputation and freedom of expression. The courts are reluctant to interfere significantly with the exercise of freedom of speech in defamation cases.[163] However, the courts in Zimbabwe have previously held that the right to free speech and reputation are equally important rights.[164]

2.3.4 ***Defamation and Iniuria***

While it is important to make considerations between slander and libel, and the attendant legal requirements to sustain liability for defamation, a distinction has to be equally made between defamation and *injuria* as the two seem to be interrelated. Defamation has a bearing on the reputation or *fama* of a person, and *injuria* refers to the impairment of dignity of a person,[165] his personal feelings, through insults or the violation of the person's subjective feelings of self-respect and self-esteem, personal pride and moral value feelings.[166]

However, it appears that Zimbabwean courts have not drawn a distinction between defamation and *iniuria*, where both claims are made in single case, as was observed by Muchechetere J in

[161] *Monson v Tussauds Ltd* 1 Q.B. 671, 692 (1894).
[162] *Mohammed v Kassim 1*972 (2) RLR 517 (A).
[163] *Moyo v Muleya & Others* 2001 (1) ZLR 251 (H) 252D-E.
[164] *Shamuyarira v Zimpapers* 1994 (1) ZLR 445 (H).
[165] J Neethling, *Neethling's Law of Personality* 2 ed (2007).
[166] M Lobster & R Midgley *The law of Delict in South Africa* (2017) 321.

Zimbabwe Newspapers (1980) Ltd v Zimunya.[167] The defence of absence of *animus injuriandi* does not apply if the defendant was negligent in publishing injurious material.

2.4. LOCUS STANDI

Locus standi refers to the capacity of a plaintiff to institute defamation proceedings in court. The right to sue cannot be exercised by all natural or artificial persons. There are instances where a company may not be allowed to sue for defamation. This arises when a company is wholly or partly owned by the government, and this is due to a public policy consideration which states that taxpayers' funds cannot be used to supress criticism. In *PTC v Modus Publications*[168] it was held that as part of freedom of expression, the public have a right to freely criticise the activities of state and its entities, and the state in return should not stifle or silence criticism by mounting defamation actions against its critics using public funds, derived from its subjects. An institution would qualify to be a state entity if it is not completely severed from the state.[169] The courts would consider the extent of government or ministerial control or influence over the entity for it to qualify as a state organ.[170] The entity's financial dependence on the state and ministerial board appointments are important factors. There is also authority that municipalities, with their public service delivery nature, qualify as state organs as such cannot sue for defamation.[171] The extent of the capacity of state bodies to sue or be sued is however discussed in detail in the paragraphs that follow.

[167] *Zimbabwe Newspapers (1980) Ltd v Zimunya* 1995 (1) ZLR 364 (S) 364. The judge observed that, 'an *injuria* which damages one's reputation is, in my view, on the same footing with an *injuria* which results in degradation and humiliation.'.

[168] *PTC v Modus Publications* 1997 (2) ZLR 492 (S).

[169] *NSSA v Minister of Defence* 1994 (2) ZLR 162 (S).

[170] Ibid (note 53 above).

[171] *Bitou Municipality and Another v Booysen and Another* 2011 (5) SA 31 (WCC). The court held that: 'The argument that because municipalities depend for their viability on revenue, they generate from their local communities by means of, *inter alia*, rates and taxes, that defamatory allegations about their honesty may have an adverse effect on people paying their rates and taxes, does not take the matter any further.'

However, a natural person,[172] juristic or artificial person (a company),[173] and a political party[174] can be defamed, and consequently sue for defamation.

2.4.1. Natural persons

Natural persons[175] have a right to sue for defamation in their own capacity or with assistance if they are minors.[176] The plaintiff has to allege that the words complained of and published were 'of and concerning' him or her.[177] Harms writes that;

> 'Where the plaintiff is part of a group or class is involved in a libel case, the matter complained of, even if it concerns the class or group must have concerned the plaintiff personally for them to be successful. If the identity of the plaintiff is not mentioned in the publication, certain evidence and facts will have to be pleaded which proves that the defamatory words concerned him or her.'[178]

2.4.2. Artificial persons or companies

Companies are often referred to as juristic or artificial persons. A question that normally arises and is quite understandable given the complexity of defamation laws is whether a company, as opposed to a natural person does have a personality right to a good name or *fama*. It has often been said that a 'corporation cannot blush.'[179] The assumption is that a company is devoid of feelings, like a natural human being, and might not possess *fama*, hence lacking *locus standi* to sue for defamation.

Neethling's Law of Personality states that;

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[172] *Zvobgo v Mutjuwadi & Others* 1985 (1) ZLR 333 (HC).
[173] *Auridium (Pvt) Ltd v Modus Publications (Pvt) Ltd* 1993 (2) ZLR 359 (H).
[174] G Feltoe *A Guide to the Zimbabwean Law of Delict* (2018) 60; *Argus P & P Co Ltd v Inkatha Freedom Party* 1992 (3) SA 579 (A) at 581E, quoted *in PTC v Modus Publications* 1998 (3) SA 1 (CC).
[175] *Mugwadi v Nhari & Another* 2001 (1) ZLR 36 (H).
[176] *Naude v Claassens* 1911 CPD 181 and *Welken NO v Nasionale Koerante Bpk* 1964 (3) SA 87 (O), as quoted in J Burchell *Principles of Delict* (2016) 153.
[177] LTC Harms *Amlers Precedents of Pleadings* (2015) 156.
[178] *Mohadi v Standard Press (Pvt) Ltd* 2013 (1) ZLR 31 (H) 33.
[179] H Horsfall 'The english solicitor, the last Profession' (March 1971). 57 *American Bar Association Journal* 252.

> 'A juristic person may sue for defamation without proof of actual damage and that it may also sue for violation of its privacy, reflecting a realistic approach to personality protection which is not only in accordance with the practical needs of modern society, but which is also sound from a dogmatic and constitutional perspective.'[180]

This view is supported by Burchell who opines that while a 'corporation may not have feelings to hurt, it certainly may have reputation or estimation in which it is held by the community.'[181] In *PTC v Modus Publications,* McNally JA,[182] as he was then, pondered the question of whether an artificial person could sue for defamation. He cited an English case of *Metropolitan Omnibus v Hawkins*,[183] wherein Pollock CB held that a corporation at common law may maintain action for libel by which its property is injured. In *Derbyshire CC v Times Newspapers Ltd*,[184] quoted in *PTC v Modus Publications*, it was held that;

> 'any corporation, whether trading or non-trading, which can show that it has corporation reputation (as distinct from that of its members) which is capable of being damaged by a defamatory statement, can sue in libel to protect the reputation.'[185]

The same approach was adopted in the South African case of *Dhlomo v Natal Newspapers and Another,*[186] where the court held that a trading corporation could sue for defamation without the need to establish special damages or actual financial loss. Special damages is money that is ascertainable for patrimonial losses arising from liquid documents or medical bills, and general damages are non-patrimonial damages that are not quantifiable, like compensation for pain, suffering, humiliation and or defamation.

One of the earliest Zimbabwe cases in which a company sued in its own name, was *Rhodesian Printing and Publishing Co Ltd & Ors v Howman*.[187] In this case, the company was awarded £150 for defamation in respect of an attack on the newspaper by a Ministry of Information official who accused it of deliberately presenting an incorrect, unbalanced and biased picture of

[180] J Neethling et al *Neethling's Law of Personality* (2007) 73.
[181] J Burchell *Principles of Delict* (2016) 154.
[182] *PTC v Modus Publications* 1997 (2) ZLR 492 (S).
[183] *Metropolitan Omnibus v Hawkins* (1893-60) All ER.
[184] *Derbyshire CC v Times Newspapers Ltd* 3 All ER 65(CA) 75.
[185] *PTC v Modus Publications*,1997 (2) ZLR 492(S).
[186] *Dhlomo v Natal Newspapers and Another* 1989 (1) SA 945 (A).
[187] *Rhodesian Printing and Publishing Co Ltd & Ors v Howman* 1967 RLR 318 (GD).

national events. Scholars find that business reputation is not different from goodwill and can be equated to an asset in business balance sheets meaning that a business can claim for any reduction in reputation. [188]

As held in *Boka Enterprises (Pvt) Ltd v Manatse and Another*,[189] fictional persons or companies:

> 'lacked certain attributes possessed by natural persons, it did not mean they should be debarred from certain remedies. By creating juristic persons, the legislature must have intended they would as far as practicable, assume the rights, duties and privileges and protections at law enjoyed by natural persons.'

In support of this view, Halsbury Laws of England state that: 'A corporate body may maintain an action for libel or slander in the same way as an individual. However, the imputation must reflect upon the company or corporation itself and not upon its members or officials only. Unlike an individual, a company or corporation has no feelings, so the only damage it can suffer is injury to its reputation. A company or a corporation cannot sue in respect of an imputation for murder, incest or adultery because it cannot commit those crimes.'[190] In other instances, it has been argued that a company cannot sue in relation of an allegation of bribery and corruption. However, the leaned authors opine that a trading company or corporation can still sue for the same because it has a trading reputation and can maintain libel or slander in respect of a statement that injures its trade or business. Furthermore, a trading company or corporation may sue for an 'imputation of insolvency, mismanagement and the improper and dishonest conduct of its affairs,' and this apply to an imputation that it 'conducts its business badly and inefficiently or that it is run by people of questionable honesty and background.'[191] In these circumstances, the company is however not required to prove that it has suffered special loss, such as financial loss. It may recover damages for injury to its goodwill.' [192]

From the forgoing, it would follow that although a fictional person might lack corpus and *dignitas,* it certainly possesses a reputation that must be protected. They are known as 'fictional persons' in law, because they have been bestowed with specific traits that combine to fit into the definition. The same rights to sue conferred on companies, also applied to academic institutions of learning

[188] M Loubster & R Midgley *The Law of Delict in South Africa* (2012) 342.
[189] *Boka Enterprises (Pvt) Ltd v Manatse and Another* 1989 (2) ZLR 117 (HC) 118.
[190]Halisbury Laws of England (1974) 25.
[191]Ibid.
[192]Ibid.

like universities. It was again held in *Boka Enterprises*,[193] that a university could also mount litigation to protect its reputation. This view on universities is supported by scholars in the law of delict in South Africa.[194]

2.4.3. Defamation of a deceased person

The current common law position is that a surviving person cannot sue on behalf of a deceased person who is defamed through a publication. In Zimbabwe, there is no known case in which a litigant sued on behalf of the deceased. It shall be argued in due course in this chapter that this common law position ought to be altered. Burchell writes that 'the dead cannot be defamed' and adds that;

> 'For a modern defamation action to lie, a living individual's reputation must have been impaired or at least the individual must have survived until the state of *litis contestatio* in his action for defamation had been reached.'[195]

For a claim in litigation that was initiated on behalf of a deceased person to be sustained at law, *litis contestatio* ought to have been reached, that is, all the contentious issues ought to have been established and the pleadings closed. If the plaintiff dies before reaching the closure of proceedings, 'the action is similarly not available against the heirs of the wrongdoer. Both the pain and action for the recovery of damages for such pain die with the demise of the person who suffered it.'[196]

The action can also arise, if the defamatory statement has an effect on a surviving person/s.[197] This is the approach the local courts are most likely to take. In an authoritative judgement, *Spendiff v East London Daily Despatch Ltd*[198] the court held that:

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[193] *Boka Enterprises (Pvt) Ltd v Manatse and Another* 1989 (2) ZLR 117 (HC) 118.
[194] M Loubster & R Midgley *The Law of Delict in South Africa* (2012) 342.
[195] J Burchell *Personality Rights and Freedom of Expression: The Modern Actio Injuriaum* (1998) 203.
[196] J Burchel *Principles of Delict* (1993) 135.
[197] G Feltoe G *A Guide to the Zimbabwean Law of Delict* 3ed (2001) 21.
[198] *Spendiff v East London Daily Despatch Ltd* 1929 EDL 113.

> '…it may be natural that a son may be wounded in his self-esteem if his father be so referred to, I think that our law has no right of action unless he himself was directly referred to and the false statement concerning his father was therefore an actual attack upon himself.'

While it may be a natural and instinctive reaction for an offspring to feel pain due to an insult upon their parent, the law cannot assist him if the false statement does not directly translate into an attack on himself.

However, Burchell persuasively opines that there have been numerous defamatory biographies of dead people that have prompted the need to protect the memory of the dead, also encompassing their privacy and dignity without neglecting the interests of historical research. The learned author argues that 'the memory of the dead cannot be translated into something which pertains to personal autonomy because, sadly, the exercise of personal autonomy has been eliminated by death.'[199]

The law ought to be developed more in this regard. It may not be necessary to give a licence to surviving individuals to vilify the memory of the deceased, by allowing them to settle old scores while taking advantage of the fact that no action may lie against defaming the dead. It is akin to absolute privilege being granted to enemies of the deceased for personal or even political considerations. It can safely be argued that the dead leave memories, legacies, and families behind. The reputation survives the deceased after the burial. It is proposed that an interdict, retraction and or in appropriate circumstances damages be granted by courts, after an action initiated by friends or relatives against unsubstantiated publications that injure the memory of the deceased. A factor that may be taken into account is why the offending publication was not raised in the deceased's lifetime. However, due care and consideration can be made to publications that are matters of public interest and are or related to genuine academic research.

2.4.4. Defamation of the state

[199] Burchell J *Personality Rights and Freedom of Expression: The Modern Actio Injuriarum*, (1998) 203.

In Zimbabwe, courts have accepted that the state or its organs cannot sue for defamation. In *PTC v Modus Publications*,[200] the learned judge McNally JA quoted extensively the legal reasoning proffered in a South African case of *Die Spoorbond and Another v South African Railways and Van Heerden* and *Others v South African Railways*,[201] where it was held that:

> 'I have no doubt that it would involve a serious interference with the free expression of opinion hitherto enjoyed in the country if the wealth of the state, derived from the state's subjects, could be used to launch against those subjects' actions for defamation because they have, falsely and unfairly it may be, criticised or condemned for the management of the country.'

The Court further in *Die Spoorbond and Another*[202] set out five reasons why it was undesirable for the state to sue for defamation:

a) The Crown's normal remedy is political action and not litigation;
b) The Crown has the remedy of criminal prosecution (where, be it noted, the onus of proof is on the state, which is not the case in a defamation action);
c) Freedom of speech is important;
d) The wealth of the state, derived from its subjects, should not be used to silence its critics; and that
e) It would be difficult to assign any limits to the Crown's right to sue for defamation once its right in any case were recognised.

The principle behind this legal reasoning was alluded to in *Derbyshire CC v Times Publications*,[203] also quoted in the *PTC*[204] case, where Lord Keith, held that: 'It is of the highest public importance that a democratically elected governmental body, or indeed a government body, should be open to uninhibited public criticism.'[205] Organs of state, if they are corporations with *fama*, have no *locus standio in judicio* to sue for defamation.

[200] *PTC v Modus Publications* 1997 (2) ZLR 492 (S) 496.
[201] *Die Spoorbond and Another v South African Railways and Van Heerden* and *Others v South African Railways* 1946 AD 999.
[202] Ibid.
[203] *Derbyshire CC v Times Publications* (1992) 3 AllE 65(CA) 75.
[204] *PTC v Modus Publications* 1997 (2) ZLR 492 (S) 94.
[205] Ibid.

Burchell also affirming the principles above reasons that: 'An action by the government (funded incidentally by the taxpayer's money) would seriously infringe the basic tenets of freedom of expression and serve to suppress criticism of the ruling power.'[206]

The question that was considered in the *PTC* case was that of balancing the state's right to defend itself against the right of the citizen to freedom of expression in respect of the manner in which the company was being managed. Acknowledging that there was no exhaustive list of criteria to be set out for companies linked to the state that could be denied title to sue for defamation, the court in the *PTC* matter set out the criteria to be taken into account when considering whether a state linked company could sue for defamation. What has to be determined is whether the statutory body has any discretion of its own and if it does, what degree of control the executive exercises over that discretion:

a) Whether the property vested in the corporation is held by it for and on behalf of the government;
b) Whether the corporation has any financial autonomy;
c) Whether the functions of the corporation are government functions;
d) Whether, if the body is not a statutory trading corporation, it performs governmental functions either at a local or national level; and
e) Whether, if the body concerned is, at least largely or effectively a monopoly. It would have to be providing what are generally regarded as essential services traditionally provided by government. In this case, it would therefore be contrary to public policy to muzzle criticism of it.[207]

In *ZESA v Modus Publications (Pvt) Ltd*[208] it was held that a statutory corporation can only sue for damages if it has a sufficient degree of independence from the state. What therefore ought to be proved is the company's sufficient degree of separation in identity and independence from the state to enable it to sue in its corporate name or whether as an entity, it is completely severed from the state.

[206] J Burchell *Principles of Delict* (1993) 156.
[207] *PTC v Modus Publications* 1997 (2) ZLR 492 (S) 492.
[208] *ZESA v Modus Publications (Pvt) Ltd* 1996 (2) ZLR 256 (H).

The public policy considerations alluded to above in shielding the state from mounting litigation for defamation are important in protecting the right to free speech in developing democracies. Autocratic states can use their financial muscle to threaten lawsuits and silence legitimate voices. The advent of the internet has profound implications to the free flow of information. While states can be attacked at will on cyber space without fear of defamatory litigation by aggrieved anonymous writers, there is a tendency by governments to resort to criminal sanctions to silence critics who legitimately express themselves on matters of public interest. Writing under anonymity, is usually a reaction of a people denied platforms for expression or who are suffering threats of reprisals. The government should resist the temptation of imposing restrictions on the exercise of freedom of expression using criminal law. There is a need to test criminal defamations laws against constitutionally guaranteed freedoms of expression.[209] Multinational companies can also use their financial capacity to sue and silent legitimate critics of management shortcomings. While their financial resources are private in nature, legislation ought to be developed to protect litigants with ascertainable legitimate defence from suffering huge damages. Once it is established that the defendant's defence though unsuccessful was based on good cause shown, the damages should either be minimal or not considered, except for retractions and accompanying apology as sufficient remedy. The internet could be significantly used to retract and make the necessary apology. The instantaneous nature of the internet can be effective in mitigating the damage done and vindicating the name of the plaintiff.

2.4.5. Political parties

In Zimbabwe there is no precedent of a political party suing for defamation. However, Feltoe[210] acknowledges that in this jurisdiction a political party can sue for damages. The principle that a political party could sue for damages, was enunciated in *PTC v Modus Publications*,[211] wherein McNally JA, upheld the decision in *Dhlomo NO v Natal Newspapers (Pvt) Ltd*,[212] accepting the

[209] *Chimakure & Others v Attorney-General* 2013 (2) ZLR 466 (S)
[210] G Feltoe *A Guide to the Zimbabwean Law of Delict* (2006) 60.
[211] *PTC v Modus Publications* 1997 (2) ZLR 492 (S) 497.
[212] *Dhlomo NO v Natal Newspapers (Pvt) Ltd* 1989 (1) SA 945 (A).

right of a South African political party, Inkatha Yesiswe, predecessor of the Inkatha Freedom Party to sue for damages.

In *Dhlomo NO v Natal Newspapers*,[213] the Appellate Division concluded that: 'a non-trading corporation can sue for defamation if a defamatory statement concerning the way it conducts its affairs is calculated to cause it financial prejudice.' In *Argus Printing and Publishing C. Ltd v Inkatha Freedom Party*,[214] the court admitted immense difficulty in drawing a distinction between political parties and bodies participating in politics. However, it held that there was no material difference between political parties and individuals participating in politics. Therefore, politicians, parties, including cabinet ministers,[215] can sue for defamation.

This approach has to be limited by the Courts. During an election process, or in circumstances where a matter of public interest has generated sufficient public debate, it can be submitted that public officials and politicians should only be allowed to litigate under limited circumstances.[216] It is opined that the constitutional grounds for limitations on the exercise of freedom of expression should provide precise and adequate provisions for the settlement of conflicts between the rights of the individual and public officers and or politicians. This is important to avoid arbitrary actions by politicians using state resources to litigate and harass the media and or the general public. The internet often generates robust political debates that degenerate into defamatory statements.

The Constitution of the Republic of South Africa, 1996 [217] allows even for the publication of false defamatory statements in the area of free and fair political activity unless the plaintiff can prove that the statements were unreasonably made in all the circumstances of its publication.[218] The Constitutional Court of Zimbabwe also considered the constitutional validity of reasonable

[213] Ibid.
[214] *Dhlomo NO v Natal Newspapers*1992 (3) SA 579 (A).
[215] *Zvobgo v Mutjuwadi & Others* 1985 (1) ZLR 333 (HC).
[216] G Feltoe *A Guide to the Zimbabwean Law of Delict* (2018) 47. It was held that: 'Put in the context of newspaper reporting it is vitally important that there should be a free press that keeps the public informed, especially about public affairs. This free press should not be stifled by highly restrictive defamation laws.'
[217] The Constitution of the Republic of South Africa, 1996.
[218] *Holomisa v Argus Newspapers LTD* 1996 (2) SA 588 (W).

publication of false information in the case of *Chimakure & Another v The Attorney General*.[219] The court found that section 31of the Criminal Code[220] had the effect of interfering with the exercise of the right to freedom of expression which is reasonably justifiable in a democratic society. Section 31 of the Criminal Code made the reporting of false news a crime punishable with a high fine and a prison sentence of up to twenty years.

2.5. Elements of Delict

2.5.1. Publication

The first requirement for defamation is publication of a statement conveyed to more than one person other than the plaintiff.[221] Burchell writes that it 'generally takes the form of an act such as, talking, writing, printing, composing, representing visually on film or television, or acting in some other way.'[222]

Scholars Loubser and Midgley[223] refer to two components of publication, that is, the act of making the material known to another (the communication), and the understanding and appreciation on the part of the recipient of the meaning and significance of the publication. Publication can be contained in a book, magazine, newspaper or on a letter to an individual. There are however considerations to be made on when a letter can be held to have been published. A letter to a company, that is not marked private and confidential would be presumed to have been opened and read by others.[224] There is a presumption that others read and understood the words in the alleged meaning once the letter has been sent and received. In the case of *Pretorius v Niehaus en 'n Ander*[225], it was stated where a letter is addressed to a private person in his personal capacity then it would reasonably be assumed that the letter would be opened and read by such person and no one else, even though it did not bear the words 'private' or 'confidential'. It was held in that case

[219] *Chimakure & Another v The Attorney General* 2013 (2) ZLR 466 (S).
[220] Criminal law (codification and reform) Act Chapter 9:23
[221] *Mavromatis v Douglas* 1971 (1) RLR 119 (G) D.
[222] J Burchel *The law of Defamation in South Africa* (1985) 75.
[223] M Loubster & R Midgely *The Law of Delict in South* Africa (2012) 343.
[224] *Pretorius v Niehus* 1960 (3) SA 109 (O) 109.
[225] Ibid.

that where a letter is addressed to a firm or company and it is not marked 'private' or 'confidential', then it can reasonably be expected that the clerks of such firm or company would open it and read it.[226]

Understanding and appreciation of the meaning, must relate to the statements made. However, there are circumstances in which the defendant can raise a defence of lack of publication, by adducing facts indicating that the plaintiff and other persons never understood the meaning of the words or the language used in the publication. This position applies in circumstances where the communication has been published in a foreign language, and or where the defendant is deaf or illiterate or if it is a secret script.[227] Should the recipient become aware of the contents of the communication at a later stage, then publication would arise.

Once publication has been established, the onus is upon the plaintiff to prove that the defendant was responsible for the publication.[228] In the context of the law of delict in South Africa[229] scholars point out that: 'Not only the person from whom the defamatory remark originated, but also any other person who repeats, confirms, or even draws attention to it, is in principle responsible for the publication.'

While it is accepted that publication would only occur if made to more than one person other than the plaintiff, communication between husband and wife does not constitute publication.[230] Liability is denied on public policy considerations that marital conversations are privileged and as espoused in the English case of *Whittington v Bowles*[231] that 'husband and wife are in point of law one person.'

[226] *Masiu v Ramos* (A217/11) [2012] ZAFSHC 79 (26 April 2012) The court held that: 'This open letter, the receipt by appellant's superiors thereof, the handing over of the letter to the appellant by his office manager, the investigation which followed the letter, clearly proved, *prima facie*, the requisite publication of matter concerning the appellant. As a general rule, publication is attributed to the respondent if she was aware or could reasonably have expected that an outsider would take cognisance of the words.'
[227] J Neethling et al *Neethling's Law of Personality* (2007) 132.
[228] *Pretorius v Niehaus* 1960 3 SA 109 (O) 112.
[229] M Loubster & R Midgely (note 90 above).
[230] *Kuzzulu v Kuzzulu* 1908 TS 1030.
[231] *Whittington v Bowles* 1934 EDL 142 145.

Once a publication has been made, there has to be a determination of the truthfulness or otherwise of it. However, in the Zimbabwean case of *Sutter v Brown*,[232] it was held that falsity is not a matter to be alleged or proved by the plaintiff after publication, because the defamatory nature of the statement is not dependent upon it being false, this is settled law. It was held that the defendant must prove the truth of the alleged defamatory words.

Liability for publication can also arise by omission,[233] where the defendant hosts a defamatory article or poster on his premises and makes no effort towards removing it. Hosting such a poster gives rise to acquiescence with the publication. There exists an obligation, or a legal duty to act, to remove it, so as to escape liability.

It appears the same will apply to postings on the internet and on social media such as Facebook, Twitter and or Instagram that originate from elsewhere. Once a blogger republishes or reposts defamatory material on his wall liability arises for republication. These are some of the aspects that relate to traditional common law principles of republication that can be juxtaposed with social media reposting or republication of defamatory material.

The publication can also be extended to those participating in its distribution. Newspapers, publishers, editors and distributors can be held liable.[234] In *Moyo v Muleya & Others*,[235] the plaintiff, a government minister, sued the editor of the publication, the reporter, publisher and distributor. Likewise, in *Bogoshi v National Media & Others*,[236] the plaintiff cited as defendants the publisher, editor, reporter and distributor. This extension applies even though the distributors, and vendors may not have necessarily been involved in the production of the defamatory articles. Gatley in *Libel and Slander*[237] writes that to escape liability, the vendors and distributors ought to allege that they were not negligent in distributing the newspapers and that they were not aware that the contents of the publication were or could be defamatory. These sentiments were also echoed

[232] *Sutter v Brown* 1926 AD 155 72.
[233] J Burchell *The law of Defamation in South Africa* (1985) 75.
[234] G Feltoe *A Guide to Media Law in Zimbabwe* (2002).
[235] *Moyo v Muleya & Others* 2001 (1) ZLR 251 (H).
[236] *Bogoshi v National Media & Others* 1998 (4) SA 1195 (SCA).
[237] C Gatley *Gatley on Libel and Slander* (1981) 354.

in *Scott v Sampson*.[238] In *Zvobgo v Kingstons Ltd*[239] the court held that liability of a distributor or publisher of defamatory material is based on negligence and not intention. The test for negligence applied to publishers and distributors is reasonable given the absence of the distributor and publishers in the routine editorial process of publishing news. Their ability to test the veracity of the facts contained in each story therein is impractical given their detached business role of only printing and distribution. Hence, they cannot be reasonably certain or attest to the truthiness or otherwise of the publications.[240] In *Mudede v Ncube*,[241] the distributors were cited as the third and fourth respondents in a defamation case in which the editor of the publication, Trevor Ncube, was joined as the first defendant for causing the publication of an offending story, by his reporter, Brian Hungwe.

There are instances that often arise where the plaintiff is not identified by name in a defamatory publication. There is still scope for the plaintiff to sue for damages, if the facts provided are such that people can identify the plaintiff. In *Manyange v Mpofu and Others*[242] it was held that the plaintiff who was not mentioned by name was required to prove that the injurious statement referred or related to him. The same approach was taken in *Mohadi v The Standard*,[243] wherein the plaintiff's name was not directly associated with the commission of a crime. If the aggregate effect of the statements, and the surrounding facts, would make a person of average intelligence identify the plaintiff as the person being referred to in the articles, the defendant would be liable.

2.5.1.1. Republication

Republication occurs when an individual, repeats or publishes a defamatory statement originally made by another person. The originator of the statement is also liable for damages if he or she is joined in the proceedings. The plaintiff has the option to join or not to join the originator of the

[238] *Scott v Sampson (*1882) 8 QBD 491.
[239] *Zvobgo v Kingstons Ltd* 1986 (2) ZLR 310 (H) 17.
[240] *Tobaiwa Mudede v Trevor Ncube* (High Court) unreported case no HH-143 / 2004 of 27 July 2004 in which a distributor told the court: 'they had no editorial input o influence over content of story, and had no way of knowing if the contents of the paper were true or not, and had no means of verification. The distributor only became aware of the contents of the newspaper, just like ordinary members of the public.'
[241] Ibid (note 106 above).
[242] *Manyange v Mpofu and Others* 2011 (2) 87 (H).
[243] *Mohadi v The Standard* [2013] ZWHHC 16 (HC).

statement in the proceedings, as was held in *Zvobgo v Modus Publications*.[244] The liability of the originator of the statement is considered if he or she: authorised or intended the repetition; or if, with the knowledge of the originator of the statement, other person was bound by moral duty to repeat the matter or the later publication naturally follows the original publication.[245]

In Zimbabwe, a defendant cannot escape liability on the basis of not originating the defamatory publication. It is not a defence to suggest that the information was already in the public domain. This position was further reiterated in *Makova v Masvingo Mirror (Pvt) Ltd & Others*,[246] where Mavangira J held that:

> 'It is no defence that someone else made the statement or that the statement has already been published in, say, another newspaper. Anyone who further disseminates a defamatory statement is also guilty of defamation because the action of spreading the story around causes more harm to the plaintiff's reputation.'

The plaintiff can exercise discretion whether to join or exclude the originator of the statement in the action. In *Zvobgo v Modus Publications*,[247] the plaintiff sued the newspaper that had republished defamatory statements arising from a press conference. The Court held that it is a mitigating factor, that the originator of the statement was not sued for damages. However, the Court did not explain in its judgment why it was a mitigating factor apart from stating that the defendant, a widely read financial newspaper, caused the publication to reach a bigger audience.

Republication is a problematic aspect in the domain of online defamation, because of different technical aspects available to social media users on Facebook, Twitter, LinkedIn and Whatsapp. In *Manuel v EFF*[248] the court, which grappled with defamatory publication on Twitter, made reference to the 'repetition rule', which was raised in *Makova v Masvingo Miror*,[249] that re-

[244] *Zvobgo v Modus Publications* 1995 (2) ZLR 96 (H).
[245] G Feltoe *A Guide to the Zimbabwean Law of Delict* (2018) 60. 'A test that has long been accepted by our courts is whether the imputations made would lower the reputation of the plaintiff in the eyes of ordinary, right thinking persons of normal intelligence.'
[246] *Makova v Masvingo Mirror (Pvt) Ltd & Others* 2012 (1) ZLR 503 (H).
[247] *Zvobgo v Modus Publications* 1995 (2) ZLR 96 (H).
[248] *Manuel v EFF* 2019 (5) SA 210 (GJ).
[249] *Makova v Masvingo Mirror Ltd & Ors* 2012 (1) ZLR 503 (H).

tweeting defamatory material is analogous to well the established repetition or republication principle under common law.

Scholars caution social media users in reposting or retweeting material originated by others. [250] Singh[251] argues that as a general principle, courts should also be cautious in their approach to the repetition rule when it comes to social media users, making reference to the Dutch case of *State v Rechtbank Den Haag*,[252] where a District Court of the Hague held that the basic rule on Twitter is that a retweet does not automatically constitute an endorsement. Singh further argues that regard should also be had to whether 'it is clear from the user's comment that he or she supports the message of the initial tweet and subsequent retweet, or whether it is clear from the context of the user's series of tweets that the retweet conveys a similar message to the user's own tweets.' [253]

Singh supports the court's view in *State v Rechtbank Den Haag*, that when assessing the sharing of defamatory statements on social media, 'South African courts going forward may similarly look to apply the repetition rule with due regard to the user's express support for the initial statement, as well as the context in which the defamatory statement is shared, without automatically presuming that all users who retweet or re-post such statements are necessarily liable if faced with a claim of defamation.'[254]

It is submitted that Singh's approach is however a slight deviation from the original common law principle, that attaches liability for republication, regardless of whether the defendant agreed with the contents or not. It is submitted that the common law principle for a liability arising from republication should apply, and not being the originator should only be mitigatory in the quantification of damages. The same approach was taken in a 2017 Swiss Court ruling where a man who 'liked' a Facebook post accusing another of anti-Semitism and racism was convicted of

[250] A Singh 'Social media and defamation online: Guidance from Manuel v EFF' 31 April 2019, Insights Defamation, Freedom of Expression, Social Media available at https://altadvisory.africa/2019/05/31/social-media-and-defamation-online-guidance-from-manuel-v-eff/ (Accessed 1 May 2020.)
[251] Ibid.
[252] Ibid.
[253] Ibid (note 115 above).
[254] Ibid .

defamation.[255] In that matter, Judge Catherine Gerwig indicted that a 'like' is associated with a positive value judgment indicating support for the content. Scholars also indicate that the judgment indicates the need for 'awareness and consciousness surrounding risks attached to online statements. People continuously fail to recognise the difficulty in retracting tweets or posts once published online as they fall within the public domain.'[256] The same was followed in *Times Pub. Co. v Carlisle*[257] where it was held that the one who republishes a defamatory statement is himself liable for the defamation, even if he attributes the information to the original publisher, and this applied 'whether the publication is libel (printed) or slander (spoken).'[258] It then becomes immaterial whether the second speaker is reasserting the defamatory statement in her own voice or attributing it to the earlier speaker.[259] It couldn't have been put more emphatically than the opinion held by Zipursky that: 'An assailant does not avoid liability for battery because the idea was someone else's and he was merely carrying through another's intention.'[260] Therefore, 'Users of Facebook must now be exceedingly careful not only about what they post but also with regards to the posts on which they may be "tagged" or which they "like", as there is clearly no unfettered freedom of expression on social networks in South Africa.'[261]

However, it has to be acknowledged that social media platforms have indisputably facilitated great intellectual, political and economic discourse, stimulating debates that enrich human minds across and beyond the diverse geographical boundaries. In developing legislation, courts should be alive to best international practice which are to be extensively discussed in Chapter 4 of the research. The court in *Manuel v EFF*, held that:

> 'Because of social media platforms like Twitter, Facebook and others, ordinary members of society now have publishing capacities capable of reaching beyond that which the print and

[255] Melanie Hall 'Swiss Court Convicts Man for 'Liking' Defamatory Facebook Post in Landmark Ruling' *http://www.telegraph.co.uk/news/2017/05/30/swiss-court-convicts-man-liking-defamatory-facebook-post- landmark/*, (Accessed 30 October 2017) referred to in: D Iyer 'An Analytical Look Into the Concept of Online Defamation in South Africa' (2018) 32(2) *Speculum juris* 133.

[256] Iyer D 'An Analytical Look Into the Concept of Online Defamation in South Africa' (2018) 32(2) *Speculum juris* 133.

[257] *Times Pub. Co. v. Carlisle* 94 F. 762 (8th Cir. 1899).

[258] *Wheeler v. Shields* 3 Ill. (2 scam.) 348 (1840).

[259] *Cianci v. New Times Pub. Co*., 639 F.2d 54, 61 (2d Cir. 1980**).**

[260] B Zipursky 'Online Defamation, Legal Concepts, and the Good Samaritan' (2016) 51(1) *Valparaiso University Law Review* 2016.

[261] A Roos & M Slabbert 'Defamation on Facebook: *Isparta v Richter* 2013 6 SA 529 (GP)' (2014) 17(6) *SCIELO PELJ/PER*. Available at http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1727-37812014000600019 (Accessed 26 April 2020).

> broadcast media can. Twitter users follow news in general on the service worldwide. They get their news either through scrolling their Twitter feeds or browsing the tweets of those they follow. When there is breaking news, they become even more participatory, commenting, posting their opinions and retweeting. Statements are debated and challenged, and people can make up their minds on the issue.'[262]

The judgment also highlights the unique challenges confronting the judiciary and society at large, as there are no separate body of law that applies to the internet.

2.6. Vicarious liability

Defamation by an employee of a company or government can be attributed to the employer through vicarious liability. Vicarious liability refers to liability arising from a situation where a company or an individual is held accountable and responsible for the actions or omissions of its employee. The liability arises if there is a professional employment relationship between the employer and employee. Vicarious liability is a form of strict liability because no fault is required on the part of the employer. Vicarious liability of the company arises in circumstances where an employee has committed a delict while operating within the scope and course of his employment. In the circumstances, there is no need for proof that the employer erred by employing an incompetent or unprofessional employee, or failed to give proper instructions, or that the employee slightly deviated from course of employment for personal errands.[263] The employer remains vicariously liable. Neethling et al[264] writes that the question of control, or authority, which does not mean factual control but the capacity or right of control, is considered to be the most important factor to determine whether the wrongdoer is an employee or an independent contractor. Thus, independent contractors are not considered employees and therefore are not liable.

Liability for publication of a defamatory material can lie with the employer, if the statement by the employee was made while he or she was acting within the scope and course of employment. The employer cannot use the defence that they did not originate the publication. To impute vicarious liability to the government for the actions of its employee, the Court in *Boka Enterprises*

[262] *Manuel v EFF and Others* 2019 (5) SA 210 (GJ).
[263] *SSA v Dobropoulos & Sons (Pvt) Ltd* 2002 (2) ZLR 617 (S).
[264] J Neethling ***et al*** *Law of Delict* (2015) 392.

(Pvt) Ltd v Manatse and Another,[265] held that the plaintiff must show that the servant's actions did not deviate from the normal course of his employment to such a degree which would lead to the conclusion that he was not exercising the functions to which he was appointed.

Zimbabwe has consistently followed the South African approach on the concept of vicarious liability. The general principle was initially stated by Tredgold CJ, in *South British Insurance Co. v du Toit*,[266] where the Court held that;

> 'Servant's act done for his own interests and purposes, and outside authority, is not done in the course of employment, even though it may have been done during his employment. Such an act cannot be said to have taken place in the exercise of his functions to which he is appointed.'

In a defamation case, *Boka Enterprises*,[267] Ebrahim J relied on the locus classicus, *Feldman (Pty) Ltd v Mall*,[268] where Watermeyer held that:

> 'if he does not abandon his work entirely and continues partially to do it and at the same time devote his attention to his own affairs, then the master is legally responsible for harm caused to a third party, which may fairly, in a substantial degree, be attributed to an improper execution by the servant of his master's work, and not entirely to an improper management by the servant of his own affairs.'

The logic is that the employer is usually in a far better financial position to atone the injured party than the employee who in most instances will not have the financial resources to pay compensation. It is, therefore, unfair to expect the employee to pay compensation for a delict arising out of performing work on behalf of the employer.[269] However there are instances where the employee would operate completely outside the framework of his job description and cause harm to others that it would be unwarrantable to punish the employer for his employee's transgressions.[270]

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[265] *Boka Enterprises (Pvt) Ltd v Manatse and Another* 1989 (2) ZLR 117 (HC) 117.
[266] *South British Insurance Co. v du Toit* 1952 SR 239.
[267] *Feldman (Pty) Ltd v Mall*, 1989 (2) ZLR 117 (HC).
[268] *Feldman (Pty) Ltd v Mall* 1945 AD 733 742.
[269] *Gwatiringa v Jaravaza & Another* 2001 (1) ZLR 383 (H).
[270] *Witham v Minister of Home Affairs* 1987 (2) ZLR 143 (H).

The general approach is that a master who employs his servant may put others at risk of harm should the servant become negligent or inefficient or untrustworthy, prejudicing third parties. It is therefore important to note that the master bears the responsibility of ensuring that no-one is injured by the servant's improper conduct or negligence in carrying out his work.

In *Boka Enterprises*,[271] a government employee wrote a letter in his official capacity that defamed a trader's company, alleging dishonest conduct. The Court held that a company has fama and can sue for defamation, and that a company, even government, was liable for the actions of its employees for conduct done during the scope and course of employment.

2.7. S*ingle publication rule*

There was legal ambiguity on whether Zimbabwe pursued a single publication rule or multiple publication rule in defamation. This was until Garwe J, held in *Mashamhanda v Mpofu and others*[272] that:

> 'The general principle is that a plaintiff should not be allowed to recover damages in excess of his actual loss or be twice compensated for the same wrong. Put another way, the plaintiff is entitled to receive a sum representing damages that he has suffered from a single wrong inflicted by all. Defamation damages are not a road to riches.'

This clarity emerged after the Plaintiff instituted multiple defamation actions against several defendants over the same cause of action..[273] Several other precedence cited in *Mashamhanda*, are in support of this proposition and they include *Robinson v Kingswell*[274] and *Zimbabwe Newspapers (1980) Ltd & another v Bloch.*[275] This common law position is further statutorily buttressed by the Damages (Apportionment Assessment) Act[276] which stressed in section 6 that the apportionment of damages in cases involving two or more wrong doers whether or not they were acting in consent, there is need to join all wrongdoers in the same action unless leave of the court is granted upon good cause shown. This legislative approach is in tandem

[271] *Boka Enterprises (Pvt) Ltd v Manatse and Another* 1989 (2) ZLR 117 (H).
[272] *Mashamhanda v Mpofu and Others* [1999] JOL 4417 (ZH).
[273] SM Kuper 'Survey of the Principles on which Damages are Awarded For Defamation' (1966) 83 *SALJ*. 477.
[274] Robinson v Kingswell 1913 AD 513.
[275] *Zimbabwe Newspapers (1980) Ltd and Another v Bloch* 1997 (1) ZLR 473 (S).
[276] Damages (Apportionment Assessment) Act 1985 (Chapter 8:06).

with a growing international approach[277] towards instituting litigation where multiple publications are involved. It is submitted that the single publication rule should he consistently followed, especially given the ubiquitous nature of the internet, where multiple publications can carry the same material or publication in different jurisdictions. [278] This may prompt the multiplicity of different actions in different jurisdictions causing unnecessary anxiety amongst publishers. This could be avoided, if what is now called the Zimbabwe factor, could be legislatively avoided, given the jurisdictional difficulties presented by the advent of the digital era.

2.7.1. The Zimbabwe Factor

The 'Zimbabwe Factor'[279] is a dictum borrowed from the Australian *Gutnick* case,[280] which in the context of defamation occurring on the internet, means a litigant can sue in different jurisdictions over the same cause of action. In the *Gutnick* case, the legal question that arose was to what extent a publisher can respond to multiple publications of the same story in multiple jurisdictions. The court made a finding that the place of downloading is ordinarily the place where an internet defamation occurs, prompting intense international debate, and confirmed the existing multiple publication rule that each communication to a third party from a website creates a separate cause of action in each jurisdiction where the communication was comprehended, and provided scope for litigants to sue in respect of defamatory publications in a different jurisdictions.

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[277] The ECJ has given a preliminary ruling to the Estonian court on the appropriate jurisdiction for a claim for violation of personality rights arising from the publication of statements online. (*Bolagsupplysningen OÜ and another v Svensk Handel AB, Case C-194/16 EU:C:2017:766, 17 October 2017*).

[278] United Kingdom, Defamation Act, 2013, Section 8: Single publication. Section 8 of the Act provides that, where a person publishes a statement to the public, the publication will be deemed to include any subsequent publications of substantially the same statement (unless the manner of publication is materially different). This 'single publication' rule aims to protect defendants from claims made long after the initial publication and replaces the previous 'multiple publication' rule which stated that each publication restarted the limitation period. The primary reason for the single publication rule is that, until now, each time defamatory material was accessed via a website it would be deemed to be re-published and the one-year limitation period would re-start. Source: V. Pandey, 'The "Single Publication" Rule Of Defamation On Social Networking Websites' Available at https://www mondaq.com/india/libel-defamation/346258/the-single-publication-rule-of-defamation-on-social-networking-websites#:~:text=Under%20this%20rule%2C%20%22any%20form,is%20considered%20published%20and%20%22 (Accessed 8 February, 2021).

[279] B Robilliard 'Jurisdiction and Choice of Law Rules for Defamation Actions in Australia Following the Gutnick Case and the Uniform Defamation Legislation' Australian international law journal Available at *http://classic.austlii.edu.au/au/journals/AUIntLawJl/2007/13.pdf*, [Accessed 8 February 2021].

[280] *Dow Jones & Company Inc v Gutnick* (2002) 210 CLR 575 ('Gutnick').

Scholars opined that the Zimbabwe Factor 'increases costs for publishers by requiring them to consider many legal standards in assessing the risk to which they are exposing themselves by publishing on the Internet.'[281] However, Australian legislative reforms through the Uniform Defamation Legislation ('UDL')[282] has created certainty for publishers, by harmonising the legislative framework for substantive defamation laws in all Australian states. Zimbabwe had adopted the same approach two years earlier before *Gutnick*, through the Damages (Apportionment Assessment) Act, and the precedence set in *Mashamhanda*, supra.

The obvious danger arising in having internet publishers liable for defamation in every jurisdiction where a litigant may mount an action is that it would curtail freedom of speech and or expression. Scholars correctly opined that this 'would require Internet publishers to consider every article they publish against the defamation laws of each country from Afghanistan to Zimbabwe (the 'Zimbabwe factor').'[283] However, the irony is that the Zimbabwe factor doesn't apply to Zimbabwe, as precedence shows the single publication rule is the common law position to date. In the advent of the internet, the Zimbabwe factor would present difficult management and financial challenges for the publishers.

2.8. Defamatory statement:

Defamatory statements may be taken to have a primary or secondary meaning. The primary meaning refers to the ordinary meaning of the words, which are defamatory per se without looking for a different interpretation. The secondary meaning usually carries an innuendo, or a meaning which could be understood by a person having knowledge of the special circumstances of the statement/s. The test for defamation is how an ordinary person of average intelligence, (referred to and discussed later in the chapter), would have understood the meaning of the words.

2.8.1. Primary meaning:

[281]B Robilliard 'Jurisdiction and Choice of Law Rules for Defamation Actions in Australia Following the Gutnick Case and the Uniform Defamation Legislation' (2007) *Australian International Law Journal*. 197.
[282] R. Breit 'Uniform Defamation Law in Australia: Moving Towards a More 'Reasonable' Privilege' (2011) *Media International Australia*(138), 9-20.
[283] Ibid.

The courts determine the ordinary meaning of the words, which may not necessarily be the dictionary meaning. The ordinary meaning is the meaning that can be deduced by an ordinary reader, having considered the context within which the words were used. Loubser and Midgely[284] write that: 'The primary or ordinary meaning of words or conduct is the natural meaning, both expressed and implied which an ordinary or reasonable reader, listener, viewer would give to the words or conduct, with specific reference to the context and circumstances in which the words have been published.'[285] Burchell also writes that in determining the meaning of the words the court must take into account not only what the words expressly say, but also what they imply.[286]

It is now settled law [287] that where the words in question are seen to convey a defamatory meaning as they are, it is the duty of the court to determine the ordinary meaning of the words; what the words would mean to an ordinary reader.

The Zimbabwean courts have a three-pronged approach to determining whether a publication is defamatory or not. In *Chinamasa v Jongwe Printing & Publishing Co (Pvt) Ltd & Anor,*[288] and also in *Moyse & Ors v Mujuru*[289] Bartlet J considered that:

a) First, consider whether the words as specified are capable of bearing the meaning attributed to them, that is, whether the defamatory meaning is within the ordinary meaning of the words;
b) Secondly, assess whether that is the meaning according to which words would probably be reasonably understood and;
c) Thirdly, decide whether the meaning is defamatory.

[286] J Burchell *Personality Rights and Freedom of Expression (1998)* 187
[287] *Chinamasa v Jongwe Printing & Publishing Co (Pvt) Ltd & Anor* 2014 (1) ZLR 753 (H)769.
[288] Ibid.
[289] *Moyse & Ors v Mujuru* 1998 (2) ZLR 353 (S).

The three stage was also followed in *Butau v Madzianike and Others*,[290] and *Chinamasa v Jongwe Printing and Publishing*.[291]

2.8.2. Secondary meaning:

Special circumstances may arise giving meaning of the words which may be known only to the publisher and recipient of the communication. Special facts, as held in *Madhimba v Zimpapers*[292] will have to be pleaded to justify why the words would have a different meaning which are within the defendant's province of knowledge. The plaintiff does not need to prove that the people understood the meaning to be defamatory, but simply that certain facts, known to them, have led them to understand the meaning of certain words in a particular way. [293] The words at face value may be innocent but carry a different meaning if certain facts are pleaded.

2.8.3. Determining a defamatory statement

The basic consideration that is employed in determining whether the publication is defamatory or not, is an objective test originating from the English law. The test is that of a hypothetical English immigrant called a reasonable person who originated under English Law and was adopted in Zimbabwe. The basic objective test is whether an ordinary, reasonable person of average intelligence would regard the statement as defamatory.[294] In a case for exception, to determine whether the words could be defamatory in *Auridium Zimbabwe (Pvt) Ltd v Modus Publications (Pvt) Ltd*,[295] Robinson J, as he was then held that Courts assess whether an average person of reasonable intelligence would attribute the same meaning to the statement, without applying the mind of how an astute lawyer or super critical reader would read a passage.

In analysing the reasonable person test referred to above, Feltoe writes that it:

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[290] *Butau v Madzianike & Others* unreported case number HH 378/12 at 9 of 8 February 2013
[291] *Chinamasa v Jongwe Printing and Publishing*. 1994 (I) ZLR 133 (H).
[292]*Madhimba v Zimpapers* 1995 (1) ZLR 391 396.
[293] M Loubster & R Midgley (note 136 above).
[294] *Sanangura v Econet Wireless (Pvt) Ltd & Others* 2012 (2) ZLR 304 (H) 320.
[295] *Auridium Zimbabwe (Pvt) Ltd v Modus Publications (Pvt) Ltd*,1993 (2) ZLR 359 (H) 368.

> 'obviously does not take account of a reader with a morbidly suspicious mind or how an abnormally sensitive or supercritical reader would respond to the contents … It should also be stressed that the test is not how highly virtuous people who always think perfectly rationally and are totally devoid of all prejudices would respond to the material. Instead, it is the likely reaction of ordinary people of average intelligence.' [296]

The reaction of the ordinary person after reading or hearing the statement, and what impact the statement would have, is what the court considers in determining whether the publication is defamatory. If he or she considers the statement to be defamatory, then the defendant would be liable. In *Zvobgo v Mutjuwadi*,[297] Sandura J, quoted with approval the case of *Demmers v Wyllie & Ors*[298] that the:

> 'Reasonable man is a person who gives reasonable meaning to the words used within the context of a document as a whole and excludes a person who is prepared to give a meaning to those words which cannot reasonably be attributed thereto.'

The same approach is referred to in another Zimbabwean case, *Velempini v Engineering Services Dept. Workers Committee for City of Bulawayo & Ors*,[299] where Holmes J, is quoted in *Dorfman v Afrikaans Pers Publikasies (Edms) Bpken Andere,*[300] commenting that:

> 'A court deciding whether a newspaper report is defamatory must ask itself what impression the ordinary reader would likely gain from it. In such an inquiry the court must eschew any intellectual analysis of the contents of the report and of its implications and must be careful not to attribute the ordinary reader a tendency towards such analysis or an ability to recall more than an outline overall impression of what he or she just read. Furthermore, in view of the mass material in a newspaper it is generally unlikely that the ordinary reader would peruse and ponder a single report in isolation.'

Learned author, Burchell describes the ordinary reader as a 'reasonable person', 'right thinking' person of average education and normal intelligence; he is not a man of 'morbid or suspicious

[296] G Feltoe *A Guide to the Zimbabwean Law of Delict* (2001) 60.
[297] *Zvobgo v Mutjuwadi* 1985(1) ZLR 333 (HC).
[298] *Demmers v Wyllie & Ors* 1980 (1) SA 835 (AD) 842.
[299] *Velempini v Engineering Services Dept. Workers Committee for City of Bulawayo & Ors* 1988 (2) ZLR 173 (HC) 179.
[300] *Dorfman v Afrikaans Pers Publikasies (Edms) Bpken Andere* 1966 (1) PHJ9 (A).

mind', nor is he 'supercritical' or abnormally sensitive.' [301] The learned judge Steyn CJ, in the South African case of *Associated Newspapers Ltd v Schoeman,*[302] states that it is also not the "fictitious, normal, well-balanced, right minded or reasonable reader.'[303]

In the Zimbabwe case of *Auridium (Pvt) Ltd v Modus Publications,*[304] Robinson J held that the criteria of a reasonable person may be slightly varied when determining a reader of a financial publication:

> 'It would probably be fair to impute to the reader of the financial gazette a somewhat higher standard of education and intelligence and a greater interest in and understanding of political, financial and business matters than newspaper readers in general have, but one should not impute to him the training or habits of mind of a lawyer.'

The same sectional approach can be applied to a religious group, if certain facts that would make an innocent statement defamatory are only known to them. The test was applied in a South African case of *Mohamed v Jassiem,*[305] where a sectional or segmented approach was considered in determining the content of a defamatory statement, which damaged his reputation within a section of a Muslim community, and not the general public. Certain words may not be defamatory per se to the general public but may assume a different defamatory meaning to a particular section of the population. However, there is a consideration that the segmented community, where the low esteem was lowered, should not subscribe to norms that are considered immoral or anti-social. In the *Velempini* case,[306] the sectional test for defamation would however not apply to a very small section of the population, for instance, a family of very limited numbers of people, but it would have to be a substantial and a respectable section of community. The same approach was endorsed by Bartlett J in *Madhimba v Zimpapers*.[307] The section would have to be a considerable segment of the population to avoid a proliferation of actions which involve tiny sections of communities.

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[301] J Burchell *Personality Rights and Freedom of Expression : The Morden Actio Injuriarum*. 2 ed (1998) 187.
[302] *Associated Newspapers Ltd v Schoeman* 1962 (2) SA 613 (A) 616 H.
[303] Ibid.
[304] *Auridium (Pvt) Ltd v Modus Publications* 1993 (2) ZLR 359 (H) 360.
[305] *Mohamed v Jassiem* 1996 (1) SA 673 (A).
[306] *Velempini v Engineering Services Dept. Workers Committee for City of Bulawayo & Ors* 1988 (2) ZLR 173 (HC) 179
[307] *Madhimba v Zimpapers* 1995(1) ZLR 391 (H) 409

There is also a sectional consideration in the application of the objective test. If the defamatory material published is known to a group of people, the test of how an ordinary member of that particular grouping would interpret the publication is considered. This would relate to a group of people in sport, music or even finance. This was held in *Association of Rhodesian Industries & Ors v Brooks & Anor*,[308] where it was held that the test will be if the person:

> 'possessed such degree of knowledge of the current circumstances of the industry as it may be proper to infer, in the circumstances of the case. '

This same principle should be applied to social media users, and the platforms that are created for the purposes of debate and social interaction. In *Manuel v EFF and Others* supra, the Court held that in online defamation cases, there are difficulties relating to establishing a standard of what would constitutes a reasonable or ordinary member of the public, given its complex nature involving people of different social pursuasions.

The defamatory material was posted on Twitter and not the traditional print newspapers. The court, *Manuel v Economic Freedom Fighters* held that: '[t]he hypothetical ordinary reader must be taken to be a reasonable representative of Twitter users.'[309] The court should take into consideration the thinking or mindset of the community of Twitter users, engaged in that subject matter to elucidate the actual defamatory meaning. In *Manuel v EFF* supra, the Court had regard to such a user 'having shared interests with the person responsible for the initial publication, which in this case related to politics and current affairs, who follow the EFF and Mr Malema and share his interest in politics and current affairs.'[310]

2.9. Causation

The element of causation in defamation proceedings is not of any significance given the presumption that once a defamatory statement has been published, the plaintiff is deemed to have

[308] *Association of Rhodesian Industries & Ors v Brooks & Anor* 1972 (2) 1 (H) 4.
[309] *Manuel v Economic Freedom Fighters and Others* 2019 (5) SA 210 (GJ).
[310] A Singh 'Social media and defamation online: Guidance from Manuel v EFF' 31 April 2019, Insights Defamation, Freedom of Expression, Social Media' Available *at https://altadvisory.africa/2019/05/31/social-media-and-defamation-online-guidance-from-manuel-v-eff/,* (Accessed 1 May 2020].

suffered injury to his or her reputation.[311] Burchell holds that the 'causal link between the publication of the defamatory words or conduct referring to the plaintiff and the consequences of lowering of the plaintiff in the estimation of others is essential.'[312] However the defendant could argue that the statement had no negative imputation on the plaintiff's reputation, or estimation in which he is held in the community and provide evidence. The defendant could also argue that the alleged defamatory imputation had no effect on the estimation in which the plaintiff is held by others because either he had no reputation to protect or he retained his good reputation regardless of the imputation.[313]

2.10. Damages

In assessing the quantum of damages, various considerations are made, and they are, as enunciated in *Bushu & Anor v Nare*,[314] the nature and content of the defamation; the extent of the publication; the reputation and status of the plaintiff; the defendant's conduct and recklessness of the publication. This approach was also followed with approval in *Robertson v Ericsen*.[315] In *Masuku v Goko & Anor*,[316] in assessing damages, other factors to be considered outlined by Patel J, were:

a) The content and nature of the publication;
b) Plaintiff's standing in society;
c) Extent of the publication;
d) The probable consequences of defamation;
e) The conduct of the defendant;
f) The recklessness of the publication;
g) Comparable awards in other cases;
h) The declining value of money.

Damages for defamation in Zimbabwe have a class character; the more prominent or rich you are, the greater the damages. However, the assessment of the quantum of damages is a matter entirely

[311] J Burchell *Personality Rights and Freedom of Expression (*1998) 204.
[312] J Burchell *The law of Defamation in South Africa* (1985) 34.
[313] J Burchell (note 164 above; 204).
[314] *Bushu & Anor v Nare* 1995 (2) ZLR 38 (H).
[315] *Robertson v Ericsen* 1993 (2) ZLR 415 (H) 419.
[316]*Masuku v Goko & Anor* 2006 (2) ZLR 341 (H) 343.

within the discretion of the presiding judge. The whole process is a matter of impression and personal opinion as held in *Rhodesian P and P CO limited v Howman NO*.[317] This is despite the fact that the law would 'not accept character assassination of individuals merely because they (are) politicians.'[318] Zimbabwe's approach to damages tends to reflect a capitalist value system which has a bearing on status and human worth.

Zimbabwean courts are generally reluctant to award substantial damages for defamation. In *Zimbabwe Banking Corp Ltd v Mashamhanda*,[319] quoted in *Mugwadi v Dube, Zimpapers & Anor*[320] it was held that:

> '…an award of damages for defamation is intended to provide vindication and consolation, not to provide the plaintiff with a financial windfall. Awards in Zimbabwe will generally not equate with those in larger and wealthier economies, but they must take into account the rapid rate of inflation here.'

The approach of the courts is not to make the plaintiff's rich out of a lawsuit, but '… provide solace for injured feelings, rather than as a way of repairing all the damage that has been done.'[321]

The highest award Zimbabwean courts have ever made was USD$10,000, in *Mugwadi v Dube, Zimpapers & Anor*.[322] The decision of the Court was that inflationary pressures would not be taken into consideration, given that the country was now using functionary United States dollars as currency. What determined the quantum of damages was the content and nature of the defamatory publication, the plaintiff's standing in society; extent of the publication; probable consequences of the defamation; conduct of the defendant; The recklessness of the publication; and comparable awards in other defamation suits and the declining value of money. The defendants, in *Mugwadi v Dube, Zimpapers & Anor*,[323] did not tender an apology for the

[317] *Rhodesian P and P CO limited v Howman NO* 1967 RLR 318 PG 342.
[318] *Moyo v Muleya & Ors* 2001 (1) ZLR 251 (H) 252.
[319] *Zimbabwe Banking Corp Ltd v Mashamhanda* 1995 (2) ZLR 96 (H).
[320] *Mugwadi v Dube, Zimpapers & Anor* 2001 (1) ZLR 36 (H).
[321] G Feltoe A *Guide to the Zimbabwean Law of Delict* 3 ed (2001) 61.
[322] The Herald 'Zimpapers appeal $10 000 defamation damages' 10 October 2015, available at *https://www.newsday.co.zw/2015/10/09/zimpapers-appeal-10-000-defamation-damages/,* Accessed 17 April 2020].
[323] *Mugwadi v Dube, Zimpapers & Anor* 2001 (1) ZLR 36 (H).

defamatory publication despite demand, and the defamatory story was found inaccurate and motivated by malice. In her assessment, Chigumba J, also considered:

> 'the effect that social media platforms have had on the extent and speed of publication, as well as our country's obligations in terms of international and regional protocols and conventions, as well as the provisions in our new constitution that seek to protect the right to non-discrimination on the basis of sex and gender, and gender stereotypes.'[324]

In the case, *Mugwadi v Dube*, [325]the Court also held that the defamatory story had stereotypes that were misogynistic, discriminatory and perpetuating wrong impressions about women. The story stated that the plaintiff frequented night clubs, was unstable and indulged in recreational drugs.

The status of a person is also considered important in the quantification of damages. This approach has been followed in precedents such as *Garwe v ZimInd Publishers*.[326] Feltoe writes that:

> 'Factors that courts consider in assessing the level of compensation are the character and status of Plaintiff, the nature of the words used and intended effect thereof, the extent of the publication, and whether or not defendant has subsequently made attempts to rectify the harm done by way of retraction and apology.' [327]

In *Mahomed v Kassim*,[328] the court, quoting with approval *Botha v Brink*,[329] held that:

> 'It is not in the public interest that prominent public figures should be unjustly maligned by newspapers or that innocent persons should not be falsely imprisoned by police.'

In *Makova v Masvingo Mirror*, the plaintiff was held to be a 'high profile politician and public figure.'[330] In *Brigadier General Rugeje v Makuyana*,[331] it was held that in assessing the quantum of damages the court derives guidance from the case of *Nyatanga v Editor, The Herald and*

[324] Ibid.
[325] Ibid.
[326] *Garwe v ZimInd Publishers* 2007 (2) ZLR 207 (H).
[327] G Feltoe *A Guide to the Zimbabwean Law of Delict* 3 ed (2012) 61
[328] *Mahomed v Kassim* 1972 (2) RLR 517 at 533.
[329] *Botha v Brink* (1878) 8 Buch. 118.
[330] *Makova v Masvingo Mirror* 2012 (1) ZLR 503 (H) 514.
[331] *Rugeje v Makuyana* High Court Unreported case number HH 52/05) [2006] ZWHHC 98 of 19 September 2006.

Another[332] which is authority for the fact that Zimbabwean courts will take a dim view of unjustified attacks of public officers which will attract punitive damages.

The Court held that:

> 'Allegations which impugn the integrity of a person holding the post of Master and Sheriff of the High Court are defamatory in the highest degree and call for punitive damages. They are much more serious than allegations defaming a politician or businessman. o attack falsely, the honesty and integrity of a person holding high office in the judicial system undermines the confidence that the public should have in the judicial system of the country.'[333]

In the *Association of Rhodesian Industries & Ors v Brooks & Another*[334] it was held that the plaintiffs' suing for an imputation that they were corrupt, were regarded as:

> 'men who occupy very responsible positions, who command respect and have earned very high reputations for integrity and competence and who enjoy, by reason of these very circumstances, substantial salaries.'

Special considerations on the status of the person in awarding damages is a controversial aspect of defamation as it provokes ideological inclinations of arguments for and against. As alluded above, there is a status aspect, in determining damages. The poorer you are, the lesser the damages, and the prominent you are, the greater the damages, yet there is a constitutional notion that alludes to the fact that we are all equal before the law.[335] It can be safely argued that the hierarchical nature of society is a conformity to political and traditional realities at play. Publication of any material related to a prominent person attracts wider curiosity and attention. If the publication is both positive and negative, there is wider attention and consideration of the issues. There isn't greater interest in information related to a nonentity, than it would to a person holding a higher person in society. As such, considerations of higher damages are legally sound. In the digital era, prominent people have generally greater trending norms, grab attention and are of high market value.[336]

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[332] *Nyatanga v Editor, The Herald and Another* 2001 (1) ZLR 63 (H).
[333] Ibid (note 186 above; 63).
[334] *Association of Rhodesian Industries & Ors v Brooks & Another* 1972 (2) ZLR 7.
[335] Zimbabwe Constitution (Amendment No. 20), 2013: 'Section 56 Equality and non-discrimination (1) All persons are equal before the law and have the right to equal protection and benefit of the law.'
[336] Hashaw 'The effect of celebrities on advertisement' 29 March, 2019, Available at *https://smallbusiness.chron.com/effect-celebrities-advertisements-56821.html*, (Accessed on 17 April 2020).

However, there are strong academic viewpoints, which attack the class approach to award of damages. Scholars take the view that an 'ordinary worker's contribution to the social good is as valuable as, say, his superiors at work and that both should receive the same amount of damages for the same sort of defamatory statement and that assumptions about human worth based upon class should be challenged.'[337]

However, punitive damages can be awarded if the conduct of the defendant was deliberate, unrepentant, and continuous and actuated by glaring malice. In *Khan v Khan*,[338] it was held that a court will be justified in awarding 'exemplary damages,' which are damages awarded to the plaintiff above the value of the determined loss of reputation designed to provide severe punishment for wrongdoers where aggravating factors are considered and found, and serve as deterrent in society. The exemplary damages are also awarded in circumstances where the defamatory statement was deliberate, malicious and the defendant was unrepentant.

Falsity is again emphasized in *Association of Rhodesian Industries*,[339] as aggravating damages. The Court held that:

> 'It has not been suggested that there is any truth in the defamatory meaning that the article has been found to bear and the evidence has demonstrated that any such imputations are wholly without substance… these were circumstances pointing to the need for substantial awards.' [340]

However, an apology will mitigate the amount of damages to be awarded if: 'It is full, unconditional and unreserved withdrawal of all imputations together with an expression of regret,' and 'it is done as soon as reasonably possible after the original publication' and 'the apology is given the same greater prominence than the original defamatory statement.'[341] The courts held that the retraction and apology must not be reluctantly or grudgingly given.[342]

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[337] S Goulbourne 'Defamation in Tanzania and its Reflection on Socialism' (1976) *Eastern Africa Law Rev* 99, quoted in G Feltoe *A Guide to the Zimbabwean Law of Delict* (2018) 61.
[338] *Khan v Khan* 1971 (1) RLR 134 .
[339] *Association of Rhodesian Industries & Ors v Brooks & Another* 1972 (2) ZLR 7.
[340] Ibid.
[341] G Feltoe *A Guide to the Zimbabwean Law of Delict* 3 ed (2001) 61.
[342] Ibid.

It appears that social media provides the opportunity for an effective and instantaneous apology where defamation arises from the publication on such platforms. In *Isparta v Richta*[343] it was held that 'a social media apology or a retraction to the plaintiff, on a platform like Facebook, in the same forum that the offending statements had been made, also clears the name of the plaintiff'. In *Isparta*,[344] the defendants refused to apologise, and insisted that they were entitled to publish the material regardless of the harmful contents it contained. In circumstances where they could have apologised, the defendants raised recalcitrant technical defences. The Court held that: 'crude as damages for defamation may be, our courts have consistently awarded damages to the victims of defamation, albeit in modest amounts since the defendants did not apologise or retract their defamatory comments, I believe that an amount of R40 000 is appropriate in the circumstances.'[345]

In a South African case, *Le Roux and Others v Dey*[346] The Constitutional Court ordered the defendants to tender an unconditional apology to the plaintiff for the injury caused to him. The plaintiff is not obliged to seek a remedy for an apology. In Zimbabwe such a consideration could be important to save time, costs and continuous publicity around the damaging allegations and this could be done away from the glare of the media.

Zimbabwean courts have not been keen to award huge damages for solatia. In *Bushu & Another v Nare*,[347] quoting *Argus Printing & Publishing Co Ltd v Inkatha Freedom Party*,[348] Grosskopf JA succinctly observed that: 'our courts have not been generous in their awards for *solatia*. An action for defamation has been seen as a method whereby plaintiff vindicates his reputation, and not as a road to riches.' The extent of the publication is also critical because the greater and wider the publication, the bigger the damages. In *Mapuranga v Mungate*[349] Malaba J, as he was then, held that the publication was not extensive and neither was it permanent.

[343] *Isparta v Richta* 2013 (6) SA 529 (GNP).
[344] Ibid.
[345] Ibid.
[346] *Le Roux and Others v Dey* 2011 (3) SA 274 (CC).
[347] *Bushu & Another v Nare*,1995 (2) ZLR 38 (H).
[348] *Argus Printing & Publishing Co Ltd v Inkatha Freedom Party* 1992 (3) SA 579 (A) 590.
[349] *Mapuranga v Mungate* 1997 (1) ZLR 64 (H).

> 'It was limited by the number of the people to whom the words were spoken – six people were in Mungate's house. The people to whom the slanderous words were spoken were not highly placed in the community in which Mr Mungate lived. They were not men and women of substance in whom he was particularly concerned to retain a good name.'

In *Prakash v Wilson & Another*,[350] the Court provided what was considered to be a helpful guidance to damages. The measure of damages given has to take into account the factual allegations that have been shown to be substantially true as highly mitigatory, and viewed in that light, the seriousness of the statements is considerably reduced. Damages of $200 Zimbabwean dollars were awarded to the plaintiff for the following defamatory statement; 'Interpol seeks local businessman', an allegation that tended to suggest criminality.

In *Tekere v Zimbabwe Newspapers (1980) & Another*[351] the award given was $11,976.00 for published statements indicating that a prominent politician, a minister in government and secretary general of the ruling party, was lazy, a womaniser, and inefficient. The allegations were widely circulated in a national newspaper and the Court took into consideration the prominence of the plaintiff, lack of an apology and seriousness of the defamatory material. Furthermore, in *Mahomed v Kassim*,[352] nominal damages of $1.00 were awarded, because the plaintiff had failed to prove that he suffered any damages at all. In *Zimbabwe Newspapers (1980) Ltd v Zimunya*,[353] despite reducing a public figure to ridicule, the plaintiff did not apologise, and damages of $15,000 for defamation and $30 000 for injuria were not deemed excessive after considering the behaviour of the defendant up to judgment.

It was held in *Thomas v Murima.*[354] that if close associates and subordinates, and immediate superiors did not believe the defamatory remarks, it was deemed mitigatory to the damages. The financial situation of the defendant can be taken into consideration in awarding the damages. In the publication, ARB *Amerasinghe Defamation in the law of South Africa and Ceylon* [355] it was I opined that South African courts are entitled to take the defendant's financial position into account

[350] *Prakash v Wilson & Another* 1992 (2) ZLR 294 (S) 301.
[351] *Tekere v Zimbabwe Newspapers (1980) & Another* 1986 (1) ZLR 275 (H).
[352] *Mahomed v Kassim* 1972 (2) RLR 517 533.
[353] *Zimbabwe Newspapers (1980) Ltd v Zimunya* 1995 (1) ZLR 364 (S).
[354] *Thomas v Murima* 2000 (1) ZLR 209 (H).
[355] ARB Amerasinghe *Defamation in the law of South Africa and Ceylon* (1969). 565-566.

in deciding whether a particular amount for damages is condign. In Ceylon, *Grafton v Cosins*,[356] Charter J, in reducing the damages awarded in the court *a quo* said the defendant was not a man of wealth and that what might prove a light penalty to a man in a sound financial position, might cause financial ruin to another person who is not an affluent individual.'[357]

Labour related strike actions are often accompanied by use of strong language that is occasionally defamatory of the employers. The emotional outbursts, and often defamatory utterances are made in highly charged and yet legitimate exercise of freedom of expressions under the constitutional right to demonstrate. The state of mind of the defendant, exercising the right to demonstrate and freedom of expression during a highly charged demonstration for a pay rise, or unfair labour practise will also be mitigatory in the award for damages. The courts have accepted that trade unionism and the accompanying right to speech is a legitimate exercise of a right, which is normal when workers are demonstrating. For defendants engaged in trade unionism, who make defamatory statements, the circumstances of each case could have an impact on the assessment of damages, as held in *Thomas v Murima*.[358] An award of $100 for the first claim was considered appropriate, because it was a mitigatory factor that that the defendant was in an emotional state and had uttered words calling a high ranking employer of a company a racist in the context of a labour dispute which had already received widespread coverage in the local media.

2.11. Conclusion

Key elements of the law of defamation are significant offshoots of English law whose application in the Zimbabwean jurisdiction have had a significant legal impact. Zimbabwe continues to be submerged in the fog of English law.

This chapter has outlined the key elements for defamation such as locus standi of litigants to be joined in proceedings, public policy considerations in preventing state entities from suing for defamation, extent of liability for political parties, constitutional law considerations that would

[356]ARB Amerasinghe *Defamation in the law of South Africa and Ceylon.* 565-566.
[357] Ibid (note 208 above).
[358]*Thomas v Murima* 2000 (1) ZLR 209 (H).

ordinarily relate to freedom of expression, and vicarious liability principles in defamation proceedings and attendant damages.

This chapter has provided a general panoramic outlook of the elements that anchor the law of defamation in Zimbabwe. However, there are statutory and common law adjustments that would need to be made as courts interpret actions arising from social media defamatory publications. These would relate to effect on the quantification of damages for material posted on the internet, and the effect of the extent of viewership and or listenership. Liability for reposting defamatory internet material is an important aspect of online defamation, which shall be discussed in detail in due course.

The next chapter, which is a development from the defamation elements, will deal with the defences available for defamation that will provide an insight to either a successful action or defence arising from litigation. Remedies available from defamation actions in the Zimbabwean jurisdiction will be provided with continuous insights into how the legislative framework could adapt and develop in the digital era.

CHAPTER THREE

DEFENCES AND REMEDIES AVAILABLE FOR DEFAMATION

3.1. INTRODUCTION

This chapter will discuss the defences and remedies available to a defendant or respondent following an action for defamation. There are several defences and remedies available and each will be activated depending on the circumstances surrounding the facts of the alleged defamation. The law of defamation replicates neurotic desire, dating back centuries, in protecting reputation. In the 9th century, the Laws of Alfred the Great provided that public slander was 'to be compensated with no lighter a penalty than the cutting off of the slanderer's tongue.'[359] Legal remedies in the modern era are accompanied by a significant sum to vindicate the defendant's good name. Defences to defamation are part of the common law that is significantly borrowed from English as well as Roman-Dutch law. The Roman-Dutch and English law are part of the Zimbabwean common law, and courts are reluctant to invoke constitutional provisions as a source of a defence to defamation on the grounds that they are well covered by the traditional precedents followed over the past centuries.[360] The previous chapter set out the elements adjoining defamation laws, and the accompanying potential adjustments in the digital era. The previously addressed elements should mirror how a subsequent defence can be mounted to an allegation for defamation. Once an allegation for defamation has been made, there are several common law defences available which are discussed in detail in this chapter. Each defence contains a set of elements which have to be successfully proved for a defence to succeed. Given the advent of the digital era, some of the defences available have to be adjusted to suit the circumstances under which defamation was made. South African courts have acknowledged that the challenges presented by the internet are enormous inviting a compelling need to develop the common law further.[361]

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[359] Lovell C 'The Reception of Defamation by the Common Law' (1962) 15 Vand. l. rev. 1051, 1053 (quoting from the Laws of Alfred the Great).

[360] *Zvobgo v Modus Publications (Pvt) Ltd* 1995 (2) ZLR 96 (H); See also *National Media Ltd v Bogoshi* 1998 (4) SA 1196 (SCA).

[361] *H v W* 2013 (2) SA 530 (GSJ) wherein the Judge held that: 'The social media, of which Facebook is a component, have created tensions for these rights in ways that could not have been foreseen by the Roman Emperor Justinian's legal team … or the founders of our Constitution. It is the duty of the courts harmoniously to develop the common law in accordance with the principles enshrined in our Constitution. The pace of the march of technological progress has quickened to the extent that the social changes that result therefrom require

In *H v W*,[362] Willis J held that 'The law has to take into account changing realities not only technologically but also socially or else will lose credibility in the eyes of the people. Without credibility, law loses legitimacy. If law loses legitimacy, it loses acceptance. If it loses acceptance, it loses obedience. It is imperative that the courts respond appropriately to changing times, acting cautiously and with wisdom.' In the coming discussion, the research sets out briefly the problems associated with defences to online defamation, which will be discussed in full as the chapter develops.

3.1.1. Problems associated with defences to defamation in the digital era

The digital era offers voluminous information, sourced and unsourced from which society depends upon. Ascertaining the authenticity of all the material on the inherently borderless internet platform is difficult. The time and finances involved for research and information verification purposes is demanding. Anonymity of online sources is a huge internet problem. Scholars write that: 'The idea that hiding one's identity while publishing should be a legally enforceable right has a more recent pedigree. The establishment of that right has been complicated by the Internet, which makes anonymity easier to achieve and harder to defeat.'[363] It's almost impossible to trace the authors for verification purposes once the material has been published online, especially when originality becomes an issue. If the client is relying on truth for public interest,[364] or public benefit, and where the information cannot be verified the defence falls away. For a defendant to sustain the defence of fair comment which is a comment found on facts, the comment published ought to rely on factual reality, or a known fact to the public.[365] Some of the unverifiable material online are based on non-existent events, or developments which may fail this defence, even if the publication was not motivated by malice. Defences of absolute and qualified privilege are normally based on verifiable material, which the defendants can easily depend upon.[366]

high levels of skill not only from the courts, which must respond appropriately, but also from the lawyers who prepare cases such as this for adjudication.'

[362] Ibid.

[363] JA Martin and MA Fargo 'Anonymity as a Legal Right: Where and Why It Matters' (2015) 16(2) *North Carolina Journal of Law & Technology* 33.

[364] *The Citizen v McBride* 2011 4 SA 191 (CC).

[365] *Hardaker v Phillips* 2005 (4) SA 515 (SCA).

[366] *Borgin v De Villiers & Anor* 1980 (3) SA 556 (A) 577.

However, care ought to be exercised on social media to ascertain the veracity of the online details before commenting. The defence of reasonable publication[367] would ordinarily attach to the media, even if it has been shown that in the recent case of *Trevor Manuel v Economic Freedom Fighters*[368] that politicians[369] can use it in litigation. Social media reactions and postings are in some instances driven by impulse, and care is not habitually taken to assess the veracity of the information, by seeking the other side for comment to balance up the information for fairness before online publication. Online offers the public little time for research as social developments happen fast, and often there is little time to apply one's mind carefully. Such a defence though important, might not be easily available for impromptu social media reactions or writings which are mostly driven by impulse. It has been argued that: 'With the constant evolution of new forms of media – and particularly the ever-growing popularity of social media – it has become necessary to revisit the old principles of the law of defamation in the light of these new media platforms. The ease and rapidity with which information can be shared, across borders and to vast audiences, is relatively unprecedented, and has undoubtedly caused sleepless nights for lawyers, policy-makers and judges grappling with how best to address these issues.'[370]

3.2. Defences available to defamation litigation in Zimbabwe

There are several defences available for defamation, some of which have been discussed above. The defences are provided by the defendant to justify the reason or circumstances for the publication of the defamatory material. The defendant would be disproving wrongfulness to publish or an absence of intention to defame. The boundaries of defences are generally determined by the considerations of reasonableness, which has broad public policy reflections.

South Africa, unlike Zimbabwe, had strict liability for publication of defamatory material. If it was established that the publication was false, the intention to harm was established. Strict liability for publication of false information was abolished by the South

[367] *National Media Ltd and Others v Bogoshi* 1998 (4) SA 1196 (SCA).
[368] *Manuel v Economic Freedom Fighters and Others* 2019 (5) SA 210 (GJ).
[369] Ibid.
[370] A Singh 'Social media and defamation online: Guidance from Manuel v EFF'. Insights Defamation, Freedom of Expression, Social Media, 31 July 2019 available at https://altadvisory.africa/2019/05/31/social-media-and-defamation-online-guidance-from-manuel-v-eff/ (Accessed 7 May 2020.)

African Supreme Court of Appeal in *National Media Ltd v Bogoshi*.[371] It is now a defence that the defendant did not intend to defame or had no animus injuriandi. This defence is not available in Zimbabwe, because once the court 'establishes that the statement was defamatory, animus injuriandi, is presumed to exist by the courts, and the defendant will only escape liability if he successfully pleads one of the recognised defences namely justification, fair comment, privilege, compensation, rixa or consent to the publication of the defamatory material.'[372] The reasonable publication defence, which was an offshoot of the *National Media Ltd v Bogoshi* case, is still to be tested in Zimbabwe.

The defences are discussed in detail below, juxtaposing each defence against the potential complications arising from online defamation.

3.2.1. *Justification*

In Zimbabwe, the defence of justification,[373] carries with it truth for the public benefit, or in the public interest. The defence of truth is not a sufficient defence on its own, as it has to be accompanied by whether it has been made in the public benefit or public interest. The defence of truth operates in circumstances where the defendant makes factual allegations, as opposed to a comment. This stems from the fact that a statement is either true or false.

3.2.1.1 Truth for the public benefit and public interest

The allegation does not have to be completely truthful in every single detail. What must be true is the 'sting of the charge' or the material allegations only. While the truth is a good ground for a defence, it might also not be a complete ground for defence under certain circumstances. There is a legal consideration that 'public interest is not be served by raking up long forgotten

[371] *National Media (Pvt) Ltd v Bogoshi* (note 8 above; at 30) where the court held that: '[W]e must adopt this approach by stating that the publication in the press of false defamatory allegations of fact will not be regarded as unlawful if, upon a consideration of all the circumstances of the case, it is found to have been reasonable to publish the particular facts in the particular way and at the particular time.'
[372] G Feltoe *A Guide to the Zimbabwean Law of Delict* (2018) .
[373] *Garwe v Zimind Publishers (Pvt) Ltd* 2007 (2) ZLR 207 (H) 231.

facts about the plaintiff which have no bearing on his present circumstances.'[374] In *Mahommed v Kassim*,[375] Beadle CJ cited a South African case, *Graham v Ker*,[376] where it was held that:

> 'As a general principle, I take it to be for the public benefit that the truth as to the character or conduct of individuals should be known. But the worst characters sometimes reform, and some of the inducements to reformation would be removed if stories as to past transgressions could with impunity be racked up after a long lapse of time. Public interest, as I conceive it, would suffer rather than benefit from any unnecessary reviving of old scandals.'

Public interest considerations generally depends on the philosophies and principles of the society concerned. Scholars write that the 'time, the manner and the occasion of the publication play an important role' [377] in the publication of defamatory facts of which the public was already aware. Racking up past indiscretions is meant to provide past delinquents a chance to move on after rehabilitation.

Where defendant raises the defence of truth for the public benefit, the onus is on him or her to prove that the words in their natural or ordinary meaning are true, and that it was important that the public receive that information for the first time as held in *Mohammed v Kassim*.[378] In *Jensen v Acavalos*,[379] it was held that a defendant establishes his defence plea if he proves that the gist or sting of the statement complained of is true. As indicated earlier, in a statement, it is not necessary that every word be proven to be true. In *Jensen v Acavalos*,[380] Khosah J held that it is sufficient if the substance of the libellous statement be justified and 'there is no need to prove every charge or detail where the gravamen of the charge has been amply justified.' Reference was made to the scholar Gatley:[381]

> '… he need not justify immaterial details or mere expressions of abuse which do not add sting or would produce no different effect on the mind of the reader than that produced by the substantial part justified.'

[374] *Graham v Ker* (1892) 9 SC 185 187.
[375] *Mahommed v Kassim* 1973 (2) SA 1 (RA).
[376] Ibid. (note 16 above 185)
[377] Neethling et al *Law of Delict* (2015) 360.
[378] *Mohammed v Kassim* 1973 (2) SA 1 (RA).
[379] *Jensen v Acavalos* 1993 (1) ZLR 216 (S).
[380] Ibid.
[381] C Gatley Gatley *Libel and Slander* (1997).

In *Bushu & Another v Nare*,[382] Blackie J, held that the statements need not be wholly true, but 'they must achieve substantial accuracy.'[383] This approach is important in that it is difficult for every spoken or written word to be substantiated. It appears this approach appreciates the common reality in daily communications, especially in material that carry political events and conduct of politicians. While it is unfair to exaggerate events and provide a harmful spin that injures the reputation of another, each case ought to be treated with its surrounding facts. It would be unfair to penalise free speech, which does not significantly stray from the factual realities surrounding the issues commented upon. In Zimbabwe, the internet has eight and a half million users, as at December 2019, representing 56.4 % of the population.[384] There is a very active social media population that raises critical concerns in the political sphere. The advent of the internet has witnessed a plethora of social media platforms that carry public discussions on matters affecting society. Regulating robust debate about public officials and public figures, in a modern maturing democracy, with advanced interactive social media platforms is difficult. Millions of people have access to the internet, and robust public debates occur daily on social media sites like Twitter and Facebook.

Social media publication often carries exaggerations or slight deviations from the truth. In the interest of free speech and cultivating discourse, courts should liberally apply the justification defence. More often than not, public figures have become active participants on such forums which could offer them an opportunity to rebut false material. A principle ought to be adopted that litigants should not sit and do nothing, if they get defamed on the internet in which they are active participants, they should mitigate the loss of their reputation by effectively rebutting the defamatory material before proceeding to mount litigation. This is a labour law principle followed in *Ambali v Bata Shoe Company Limited* where the court held that:

> 'I think it is important that this Court should make it clear, once and for all, that an employee who considers, whether rightly or wrongly, that he has been unjustly dismissed, is not entitled to sit around and do nothing. He must look for alternative employment. If he does not, his damages will be reduced.'[385]

[382] *Bushu & Another v Nare* 1995 (2) ZLR 38 (H).
[383] Ibid 39.
[384] Internet World Stats Usage and Population Statistics Available at *https://internetworldstats.com/africa.htm#zw*, (Accessed 7 May 2020).
[385] *Ambali v Bata Shoe Company Limited* 1999 (1) ZLR 417 (S) 418.

In her defamation lawsuit against a prominent former government official, political activist and academic Fadzai Mahere argued that:

> '… allegations were highly defamatory, given that they were retweeted several times and published on various electronic social media platforms. The allegations were false and highly defamatory. These false allegations were seen not only by the defendant's followers on Twitter but were also retweeted several times and carried on various electronic, social media platforms and online newspapers as the defendant must have known would happen.'[386]

While Mahere is an active social media person, she ought to mitigate her loss. The yardstick should be higher, if you are a public figure, considering your accessibility to social networking sites. However, for the defence of truth and public benefit to suffice, the statement published must carry some information which is new to the general public. In *Mahommed v Kassim*,[387] it was held that:

> 'public benefit flows from making the misbehaviour of the plaintiff known to the public. It seems to flow from this that which has been said must be something of which the public are ignorant.'

There is some advantage that ought to be derived to the general public by having that information known or brought to its attention. While public benefit relates to relaying new information to the public for its benefit, public interest pertains to informing the public of a matter that they are not aware of but that is of interest for them to know. Repeating information that they were already privy to is of no added value to them.

The publication of that statement at the material time ought to be for the public benefit. Public interest on the other hand, lies providing information to the public that it wasn't aware of beforehand, which is in its interest to know. As an example, this would relate to the new information about the integrity or competence of a public official appointed to hold public office, and or credentials of an individual during an election campaign. However private and unrelated details of the individuals' friends and or relatives would not suffice.

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[386]Charles Laiton 'Mahere sues Petina Gappah over tweet' *Newsday Online* 13 October 2018 Available at *https://www.newsday.co.zw/2018/10/mahere-sues-petina-gappah-over-tweet/*, (Accessed on 19 May 2020).
[387]*Mahommed v Kassim* 1973 (2) SA 1 (RAD).

Another example, for emphasis, would be of interest for a manager of a football team to know that a prospective player that is to be brought from another football team had been involved in match fixing scandals before, if he wasn't aware of this material fact. But if the manager proceeded to buy the player despite having been fully informed of these background facts, which his player had been convicted of, it does not seem to be of benefit to the manager if someone repeated to him what he already knew about the match fixing issue.

The conduct of public officials is important in the application of this defence. It was held in *Madhimba v Zimpapers*[388] that the limit of comments about the conduct of public officials are wide, and that those occupy public posts must not over-sensitive because whatever they say or do is of interest to society. Scholars in the field of personality rights write that:[389]

> 'The public has an interest in defamatory remarks which question the integrity or competence of public officials or figures, or which are critical of the management of public or quasi-public institutions.'

The interest is even higher if the public official has committed a crime.[390] The character and conduct of the public figure becomes a matter of public interest.[391] This same approach was followed in *Jensen v Acavalos*.[392]

The legal logic for this approach emerged from Paulus, where he is quoted in the work of Melius de Villiers[393] asserting that:

> 'It is not right and just that anyone who has defamed a guilty person should on that account be condemned; for it is both proper and expedient that misdeeds of delinquents should be known.'

There is no benefit, unless the publication has some advantage to the public. Loubster and Midgley[394] opine that the primary meaning of public benefit and public interest differ in the sense that benefit denotes some advantage to be gained by the public in knowing the information while interest, will relate to the fact that the material must be of interest or have

[388] *Madhimba v Zimpapers* 1995 (1) ZLR 391 (H).
[389] J Neethling et al *Neethling's Law of Personality* (1998) 154.
[390] Musakwa v Ruzario 1997 (2) ZLR 533 (H).
[391] Neethling (note 15 above; 154)
[392] *Jensen v Acavalos* 1993 (1) ZLR 216 (S) 228.
[393] Melius de Villier *The Roman and Roman-Dutch Law of Injuries* (1899) 104.
[394] M Loubster & R Midgley *The Law of Delict in South Africa* (2012) 360.

curiosity value. The two phrases denote a notion of public concern, 'in that the material is important and relevant, and that the public is made aware of the information, because the knowledge may be of interest in the public domain.'[395]

It appears the courts are trying to make a distinction between petty information that would pass off for a mundane useless gossip, or bar talk, to information of material value that can assist in decision making processes in our daily lives. The test being the value, validity and relevance of the contested information contained in the publication. Therefore, caution has to be exercised in raising this defence. The informational value of the publication has to be incontestable, and its material value be new and of fundamental importance in helping the formulation of productive opinions that guide and shape society.

The defence of justification has its own difficulties, if consideration is applied to the public interest and benefit requirement. Not all information that is published online is new. An individual relying on this defence might not be aware that the same information he has posted has existed in the province of the public for a long time. Therefore, it might not be a successful defence, given the problematic nature of verifying whether the availed online information has existed before or not.

3.3. Absolute and Qualified Privilege

Statements which are made on privileged occasions are not actionable. The privilege may be absolute or qualified. The difference between the two defences is that the defence of absolute privilege is complete and cannot be actionable even if the publication was false.[396] The defence of qualified privilege would not apply, where malice is established in the publication of the statement. [397]

3.3.1. Absolute privilege

[395] M Loubster & R Midgley (note 33 above; 360).

[396] Privileges, Immunities and Powers of Parliament Act 1996 [*Chapter 3:03*]. Section 148 subsection (1) provides as follows: ' The President of the Senate, the Speaker and Members of Parliament have freedom of speech in Parliament and in all parliamentary committees and, while they must obey the rules and orders of the House concerned, they are not liable to civil or criminal proceedings, arrest or imprisonment or damages for anything said in, produced before or submitted to Parliament or any of its committees.'

[397] *Musakwa v Ruzario* 1997 (2) ZLR 533 (H).

Absolute privilege applies to statements made during parliamentary debates in which legislators or councillors debate matters of public concern.[398] The statements are privileged and are not actionable. The immunity from defamation which protects parliamentarians or councilors from actions of defamation enables them to speak and express themselves, while freely advancing democracy.[399] Loubser and Midgely [400] write:

> 'In the interests of democracy, free speech and full and effective deliberation, statements made while participating in parliamentary proceedings and those in provincial legislatures are accorded absolute protection against actions under *actio iniuriarum*.'

In Zimbabwe, such protection is provided by statutory law under the Privileges and Immunities of Parliament Act[401] in the 'interests of unconstrained and probing debate.'[402] This approach has its historical basis in the British Westminster model, which is followed in many commonwealth jurisdictions. This privilege is vital, and that explains why it has survived alterations in its lifespan. It appears the sanctity of parliament, and the necessity for unfettered public debates on matters of public interest and or significance has taken precedence over the desire to want to constrain public debates over narrow sensitivities to reputational considerations. This is important because parliamentarians, as public representatives, form an important arm of government which hold the executive to account. In exercising this role, some degree of flexibility, fearlessness, and freedom to express oneself in parliament is important in order to eschew the occasional threats of litigation which may muzzle their right of expression. Such immunity is the oxygen that drives a fully functional democracy. Which explains the protection by law no matter how malicious and improper the motive in making the statement was. The immunity is also granted regardless of the fact that they might have acted unlawfully.

The application of absolute privilege to online defamation is problematic. If a social media posting carries factual information about the privileged statement emanating from parliament, and an individual posts a scurrilous comment based on the privileged statement, to what extent can such a person be found liable for defamation? As an example, legislator A calls B a public servant a thief in parliament, and C posts material on Twitter calling B a thief on the basis of A's statement and goes further to lampoon the person of B arguing he should never

[398] Privileges, Immunities and Powers of Parliament Act 1996 (note 35 above).
[399] *Dikoko v Mokhatla* 2006 (6) SA 235 (CC).
[400] M Loubster & R Midgley *The Law of Delict in South Africa* (2012) 366.
[401] Privileges and Immunities of Parliament Act, 1996 Section 5 (Chapter 3:03).
[402] G Feltoe *Guide to the Zimbabwean law of Delict* (2006) 64.

hold public office, using words, phrases, and comments which did not form the original statement said in parliament.

It is submitted that B' statement could be viewed in the context of a fair comment, and the court could measure statement of facts as opposed to comment, that have no direct bearing to the original statement to find liability. As indicated earlier, a robust and unmitigated debate should be allowed some measure of flexibility without the shackles of stifling defamatory laws to online debates.

3.3.2. Qualified privilege

Qualified privilege applies to situations or circumstances where a person has a right or duty to communicate defamatory material even if it turns out to be untrue.[403] The person to whom the communication is made must have a legitimate right to receive that particular information.[404] There are circumstances where the law permits the passing of defamatory information, of which, there ought to be an underlying and recognisable moral, legal right and or duty to communicate such information to another person, who should have a corresponding right to receive the information. The defence of qualified privilege, would protect the communicator of the defamatory material.

The defence can still apply if that information turns out to be false. Qualified privilege statements are rebuttable if the plaintiff can prove that the statement was actuated by malice or some improper motive. Where it can be proved that the information though privileged was maliciously published, the defence may fail.[405] In the case of *Bushu & Another v Nare,*[406] the Court held that two of the three people who received the information did not have a duty or legitimate interest in receiving the information and therefore the defence of privilege failed. It remains the responsibility of the person suing to provide proof that the statement was motivated by malice, should the defendant raise the defence of privileged occasion. The operation of the defence of privilege is illustrated by the case of *Musakwa v Ruzario*.[407] In this case the defendant deposed to an affidavit, that he forwarded to the Secretary of Justice and the

[403] *Mugwadi v Nhari & Anor* 2001 (1) ZLR 36 (H).
[404] *Thomas v Murimba* 2000 (1) ZLR 209 (H).
[405] *Nyandoro v Kamchira* 1997 (1) ZLR 522 (H).
[406] *Bushu & Another v Nare* 1995 (2) ZLR 38 (H).
[407] *Musakwa v Rozario* (note 36 above).

Commissioner of Police, making allegations that the magistrate who was adjudicating his brother's criminal trial had asked for a bribe from him.[408] The court held that the information, contained in the affidavit was privileged because the people to whom the information were addressed had a legal, and moral duty to receive the information.

In *Jensen v Acavalos*,[409] Khosah J stated that the defence of qualified privilege may be rebutted by proof, that the statement was not germane to the judicial proceedings. In *Thomas v Murimba*,[410] Chinhengo J, quoting Burchell J, held that it was 'lawful to publish a defamatory statement in the discharge of a duty or the exercise of a right to a person who has a corresponding right or duty to receive the information. Even if a corresponding right or duty to publish does not exist, it is sufficient if the publisher had a legitimate interest in receiving the material.'[411] It appears in this defence, the duty to relay the information must be informed by some reasonable circumstance warranting the need the share. The information ought to be above ordinary gossip or cheap talk, but a sound professional and or social consideration that is of significant value to the receiver of the communication. The Court, in *Thomas v Murimba*, further held that in respect of the defence of qualified privilege, 'the range of duties or rights to communicate defamatory matter are wide and must be widened further for the greater good of social transparency.'[412] This is important because people receive information for various reasons and under varying circumstances. The law ought to develop further to embrace such consideration. It cannot be inflexible.

On social media, it is however difficult to determine who has the legal, moral, social, or legitimate right to receive information. This will however depend on the nature and form of the group, and the information provided could depend on the whether or not the group could have reasonably expected to receive it or has a social and duty to receive it. In Zimbabwe there is no precedent on qualified privilege being raised as a defence on information published on social media platforms. South African courts have also admitted that: '… there is a dearth of South African case law on the question of the social media.'[413]

[408] Ibid.
[409] *Jensen v Acavalos* 1993 (1) ZLR 216 (S).
[410] *Thomas v Murimba* 2000 (1) ZLR 209 (H).
[411] Ibid.
[412] Ibid.
[413] *Heroldt v Wills* 2013 (2) SA 530 (GSJ).

In a social setting such as Zimbabwe, the Court in *Thomas v Murimba*,[414] held that with its accompanying history of racial discrimination and continuing racial tendencies, it is even more imperative to widen the scope of qualified privilege, as this would help combat racism. The Court held that the basis of the defence was that of public policy, hence the need to expand the list of what would be considered the rights, duties and interests that are considered as legitimate under the defence. This approach is important in the digital era, where various reasons motivate people to share or provide information on the social media platforms. In certain circumstances, the communications shared could have damaging effect to the reputation of an individual. While each publication will be treated on its own merit, common law could be developed to meet the justice of every emerging case, considering the interest of the community and or individual, motivations of the communicator, value and or relevance of the communication, and or whether any other medium of communication could have been used without causing the reputation damage.

The court's view in *Thomas v Murimba* that shouldn't be a closed list of duties, rights, and interest is legitimate in the digital era, where, for the first time in history, people have an unhindered access to instant communication that can be shared on social media platforms. People are eager to share, among others, their contentious history with its historical imbalances, land issues and gender and politics. While every case must be treated on its own facts and circumstances, legitimate and burning issues of public concern must not be lost to the court in assessing the privileged circumstances where a defamatory statement is made around an emotive subject which is a pertinent issue of public interest. There is no cap on the list of scenarios that will affect the public's views and attitudes across the range of political, social, religious and even moral ideals.

In making an assessment whether the occasion was privileged or not, Joubert JA, as he was then, in *Borgin v De Villiers & Another*,[415] held that the test was an objective one. The court was compelled to determine the case using the ordinary reasonable man test, and having considered the parties relationship and surrounding circumstances. Factors arising would be whether the circumstances, using a reasonable person test, created a duty or an interest which

[414] *Thomas v Murimba* 2000 (1) ZLR 209 (H).
[415] *Borgin v De Villiers & Another* 1980 (3) SA 556 (A) 577.

entitled the defendant to publish the information concerned and whether the public policy consideration justified in the making of the statement.

The occasion will also be privileged, where an employer writes a testimonial on behalf of a former employee,[416] to a prospective employer, or a school head, about a prospective student or former student. The duty to communicate may be legal or moral.[417] The defence of privilege, will also apply to publications and or statements made during court proceedings and or quasi-judicial proceedings.[418] Members of the judiciary, counsel, witnesses and litigants are protected from statements made during the course of the litigation.[419] The defence of qualified privilege is available to the defendants only if it can be proved that the statements are germane to the proceedings, and were not actuated by malice.[420] Burchell asserted that there are some instances in which privilege could be forfeited:

> 'As far as witnesses, litigants, advocates and attorneys are concerned, privilege will be accorded to them only if the defamatory words were relevant to the case and founded on some reasonable cause.'[421]

In *May v Udwin*,[422] the Court held that 'it is malice or improper motive, which leads to the forfeiture of qualified privilege.'[423] It is an appropriate contemplation at common law that for defence of qualified privilege to succeed in matters related to judicial proceedings, that statements ought to be germane to the proceedings. This would protect litigants from malicious abuse of the judicial process by individuals who are potential judicial or legal activists, who would abuse court process by settling old scores using the legal or judicial platform to vilify others and hide under the guise of qualified privilege.[424] In highly charged and politicised legal cases, there is often personal vendettas that are settled on the altar of judicial processes. As such, common law ought to intervene, in appropriate situations to protect only those

[416]Burchell *Personality Rights and Freedom of Expression: The Modern Actio Injuriarum* (1998) 287.
[417]*De Waal v Ziervogel* 1938 AD 112.
[418]*Tuch &Ors NNO v Myerson & Others NNO* 2010 (2) SA 462 (SCA).
[419]*Joubert & Ors v Venter* 1985 (1) SA 654 (A).
[420]*Chalom v Wright and Another* Unreported case delivered South Gauteng High Court No. (4104/13) [2015] ZAGPJHC 105 on 4 June 2015. Authority for the proposition that statements made in the course of, or in connection with, judicial or quasi-judicial proceedings are protected under the privilege. Privilege exists where 'someone has a right or duty to make, or an interest in making, specific defamatory assertions and the person or people to whom the assertions are published have a corresponding right or duty to learn of an interest in learning of such assertions'
[421]J Burchell *The Law of Defamation in South Africa* (1985) 252.
[422] *May v Udwin* 1978 (4) SA 967 (C).
[423]Ibid.
[424]*Udwin v May* (note 64 above).

publications germane to the proceedings. However, the law is not clear on how it can deal with ordinary abuse, or insults, arising during court proceedings. It is contemplated that perhaps a litigant could sue for *inuria*.[425]

Qualified privilege[426] can be extended as a defence to social media publications. The traditional principles that apply to protection of defendants using the privilege defence could be extended to social media, if the context and circumstances are applicable.[427] However, courts should avoid being too rigid, and consider the potential for robust nature of social media postings.

3.3.3. Fair Comment

If the objectives of fair comment are to be considered, it would appear this defence is meant to promote freedom of expression. Fair comment gives the public an opportunity to express themselves about pertinent issues of public interest and on factual matters that are of public interest, in the form of a fair manner, even though there could be exaggerations, or insults. The authority for fair comment is *Crawford v Albu,*[428] a South African case which has been extensively quoted in Zimbabwean precedents.[429] In *Madhimba v Zimbabwe Newspapers*,[430] Bartlett J, quoting the fair comment requirements set out in in *Marais v Richard & Anor*[431] held that:

i) The allegation in question must amount to a comment (opinion);
ii) It must be fair;
iii) The factual allegations on which the comment is based must be true.

In *Madhimba v Zimpapers*,[432] it was held that the fair comment defence is only available if it is based on facts expressly stated and known, arising from either a document or speech. The facts should arise from a matter that it generally in the public domain, in which the defendant could be basing his or her opinion upon. In *Bushu,*[433] the Court pointed out that the facts from which

[425]*Sokhulu v New Africa Publications Ltd and Others* [2002] 1 All SA 255 (W).
[426]*May v Udwin* (note 64 above).
[427]Ibid (note 66 above).
[428]*Crawford v Albu* 1917 AD 102 at 114.
[429]*Moyse & Ors v Mujuru* 1998 (2) ZLR 353 (S).
[430]*Madhimba v Zimbabwe Newspapers* 1995 (1) ZLR 411.
[431]*Marais v Richard & Anor* 1981 (1) SA 1157 (A) 1167.
[432]*Madhimba v Zimpapers* 1995 (1) ZLR 391 (H).
[433]*Bushu & Anor v Nare* 1995 (2) ZLR 38 (H).

the comment or opinion is being made must be clear to those who read it, including the facts and comments that are made upon them. This view is echoed in an English case wherein Lord Denning remarked that, 'In order to be fair, the commentator must get his basic facts right. The basic facts are those which go to the pith and substance of the matter.'[434]

There are instances where facts are known to the general public, such that there may not be any need to make reference to them to justify making the comment or opinion. If the comment is literary criticism involving literary work, and the subject matter of comment is already in the public domain, proving those facts might be needless. The reason behind this is that facts are already known to the general public. This was highlighted in *Kemsley v Foot & Others*[435] and *Heard v The Times Media Ltd & Another*.[436]

As suggested in *Kemsley*,[437] facts necessary to justify a comment might be implied from the terms of the contentious article, and a question may however arise on whether there was sufficient clarity to justify the comment being made. Gatley is quoted in *Madhimba,*[438] where it is stated that the 'limits of criticism are exceedingly wide and that the mere circumstances that the language complained is violent, exaggerated or unjust will not render it unfair.'[439] The latitude given would have been whether any fair man would have made such a comment. Lord Hewart CJ, summing up *Stokes v Sutherland (1924) Printed cases 375,*[440] stated that mere exaggeration and even gross exaggeration would not make the comment unfair however wrong the opinion expressed maybe in truth or however prejudiced the writer may still be within the prescribed limit.

Public figures, actors, artists, are often subjects of legitimate criticism. Gatley writes that:

> 'one who goes upon the stage to exhibit himself to the public or who gives any kind of performance to which the public is invited may be freely criticised. Such criticism is not actionable however severe or incorrect it may be so long as it is an honest expression of the critic's real views and not mere abuse or invective under guise of criticism.'[441]

[434] *London Artists Ltd v Littler* [1969] 2 WLR 409.
[435] *Kemsley v Foot & Others* (1932) 1 AII ER 501.
[436] *Heard v The Times Media Ltd & Another*1993 (2) SA 472 (C).
[437] Kempsely case (note 76 above).
[438] *Madhimba v Zimpapers* 1995 (1) ZLR 391.
[439] Ibid.
[440] *Stokes v Sutherland (1924)* Printed cases 375.
[441] C Gatley *Gatley on Libel & Slander* (1981) 745.

The question that can be posed is what constitutes a 'fair' statement? The Court in *Bushu*,[442] quoted the case of *Roos v Stent & Pretoria Printing Works Ltd*,[443] where Smith J held that the word fair is used in a specialised sense. Smith further stated that the opinion, or comment must be one which a fair man, however extreme his views may be, might honestly have, even if his views may be prejudiced.

Social media is awash with comments on public officers, or issues with a public interest inclination. Twitter often carries highly abusive, derogatory, offensive and unpalatable remarks from the public. Offended public officers have often sued over statements emanating from Twitter accounts.[444] It appears the defence of fair comment, can still be juxtaposed with all its elements to statements appearing on social media. For the plaintiff the identities of the defendants account handlers should be visible and ascertainable. Challenges to mounting a successful litigation can arise if the identities of the handlers are hidden, or pseudonyms are used. In *Heroldt v Willis*[445] the Court noted that: 'If the author of the defamatory statement is known then that person can be sued but the problem is that Internet users can easily create bogus profiles and make anonymous and unlimited defamatory postings regarding any person.'[446] The liability of the service providers can then arise. The immediate remedy will be suing the hosting social media provider to delete the material.[447] Problems arise if jurisdictions are different. The offensive or defamatory postings can originate from an individual in Europe, defaming another person living and working in Zimbabwe. This will provoke the need for chamber applications to attach the assets of the defendants to found jurisdiction. If the defendant has no assets, perhaps service providers could be compelled to delete offensive material. Scholar Nel, observed the hazards of social media:

> 'the major weakness exposed by the Internet is its total disregard for political and geographical borders. The ever-increasing expansion of the Internet is turning us into a so-called global community. A balance must be maintained between freedom of speech on the one hand and regulation on the other. System operators play a vital part in the communication process since they provide a service that facilitate communication between users. It is therefore important that the boundaries of liability of system operators be

[442]Bushu (note 73 above).
[443]*Roos v Stent & Pretoria Printing Works Ltd* 1909 TS 988.
[444]*Manuel v EFF* case (note 9 above).
[445]*Heroldt **v** Wills* 2013 (2) SA 530 (GSJ).
[446]Ibid (note 88 above).
[447]*Manuel v EFF* case (note 9 above).

clarified to eliminate or reduce harm in such a way that the provision of network access is not unnecessarily deterred.'[448]

3.3.4. Jest

In Zimbabwe, it is a defence to a defamation action to allege that the statement was made in jest or as a joke. Feltoe writes that the defence of jest would qualify if the character of the statement and the circumstances in which the statement was made would not be reasonably understood in a defamatory sense.[449] In *Makova v Modus Publications*,[450] it was held that where a defamatory statement is published which is intended to be a joke, but which is understood by the ordinary reader as an imputation against character then no defence would be available. In the *Makova*[451] case, Gillespie J, outlined principles applicable to the defence of jest, which demonstrate the limitations of what is permissible in poking fun. The learned judge held that the elements are to be determined primarily according to how the parody is understood. If the lampoon is understood in a jocular vein, then no actionable conduct is available. If it is understood as conveying a defamatory imputation then depending upon the place accorded *animus injuriandi* in the law, liability might still be avoided if an acceptable state of mind is disclosed. The test for whether the defamatory statement is a joke or not is objective. 'When attempting to discover the ordinary meaning of a passage,' Gillespie further pointed out that there was need, 'to strike a balance between subtle analysis and hasty misconception, between cool reserve and excitability. One should nevertheless tend to favour the more reasoned approach to the illogical for that is at the very heart of the definition of a reasonable man.'[452] For a plea of jest to succeed, a reasonable bystander should have regarded the words a joke.[453] There are many jokes that are found on social media, which caricature individuals to the extent it may be difficult to draw a line with defamatory content and jest. While each case could be treated with its own facts and circumstances, the objective test that could apply is what a reasonable reader, privy to the contents of the publication on social media would think. The social platforms carry their own identities, nuances and meanings which may not be discernible

[448] S Nel 'Online defamation: the problem of unmasking anonymous online critics' (2007) *Comparative and International Law Journal of Southern Africa*. 193-214.
[449] Feltoe A *Guide to the Zimbabwean Law of Delict* (2006) 64.
[450] *Makova v Modus Publications 1*996 (2) ZLR 326 (H)351.
[451] *Makova v Modus Publications* (note 93 above).
[452] Ibid.
[453] Neethling et al *Law of Delict* (2015) 166.

to others. Context and meaning, juxtaposed against alleged facts will help in the elucidation of the matter.

Social media is awash with jokes. The courts should seriously consider the application of this defence when it is proffered in an online defamation matter. Ultimately, facts and circumstances of each case will determine the liability of the defendant. The apex court dealt extensively with this defence in *Hendrick Roux v Louis Dey*.[454] The Court suggested that the defendant bore the onus to prove 'good clean fun designed for amusement.'[455]

Social media entail numerous jokes, intended to provoke debate and perhaps in some instances, set the agenda. To allow for flexibility of debates, the courts should not be stringent to online content. Even if caution were to be called to be exercised for defamatory online publications, some latitude for free expressions should be allowed. It is submitted that the apex court judgment in *Le Roux v Louis Dey*, was harsh to the extent that it failed to consider the mental disposition of kids, and the general creativity and social license that should ordinarily accompany online material. The reasoning of the court a quo was proffered where, writing for the majority of the Supreme Court of Appeal in the case, Harms DP formulated the principle as follows:

> 'It appears to me that if a publication is objectively and in the circumstances in jest it may not be defamatory. But there is a clear line. A joke at the expense of someone – making someone the butt of a degrading joke – is likely to be interpreted as defamatory. A joke at which the subject can laugh will usually be inoffensive.'[456]

The legal precedent of a Zimbabwean case is *Kimpton v Rhodesian Newspapers Ltd*.[457] In this case the Court said that a statement which raises a laugh is defamatory when there is an element of *contumelia* in the joke, which is either insulting and or degrading to the plaintiff. The court in *Le Roux v Dey*, further adjudged that the 'real question is whether the reasonable observer, perhaps, while laughing, will understand the joke as belittling the plaintiff; as making the plaintiff look foolish and unworthy of respect; or as exposing the plaintiff to ridicule and contempt. Everyday experience tells us that jokes are often intended to and are frequently more

[454] *Hendrick Roux v Louis Dey* (2011) ZACC 4.
[455] Ibid.
[456] *Le Roux and Others* ***v*** *Dey* 2010 (4) SA 210 (SCA).
[457] *Kimpton v Rhodesian Newspapers Ltd* 1924 AD 755. 757-8.

effective in destroying the image of those at whom they are aimed. If the joke then achieves that purpose, it is defamatory, even when it is hilariously funny to everyone, apart from the victim.'

The intention of the respondent should then become a special consideration. In the *Roux* case, kids never intended the joke to destroy the image of the plaintiff. If it is a joke, it will be taken as such. People tend to react differently to jokes if they are aimed at them. But if a reasonable person would think or react differently, especially if it is emerging from online, the court should not follow the *Roux* case approach. The test should not be how the plaintiff would react, as suggested by the court a quo, per Harms DP judgment. It should be how the reasonable person, would have reacted to the joke.

If it is a joke, it can be seen as such, regardless of how the intended target would react. This approach was followed in *Makova v Modus Publications*.[458] Social media users are a carefree, jovial, an insensitive lot who want fun. Malice is limited, if there are socio-political considerations, and matters of public interest. As such, court should bestow some degree of licence to social media users to exploit their socio creative talents to manipulate, to some degree, issues or depictions as a means to provoke humour and act as some outlet or catharsis to everyday boredom of politics or business. Social media has provided that very outlet through its social networking sites.

3.3.5. Rixa

Rixa is a defence of provocation. A defendant can allege that he reacted angrily to the conduct of the plaintiff leading to the publication of a defamatory statement. This happens in robust heated debates on social media platforms. While other users of the social media platforms tend to hide behind anonymity, there is a general relaxed communication style, which occasionally degenerates during heated events such as politics, elections and contentious matters of public concern. Given different emotional attributes of users during online debates, misunderstandings occur, the debating tone provocatively degenerates into name calling, offensive words are used, and defamation giving rise to litigation may arise. While each case

[458]*Makova v Modus Publications (Pvt) Ltd* 1996 (2) ZLR 326 (H).

will be determined on its own merits, Courts generally need to have a way of dealing with the defence of provocation in an online environment.

Feltoe writes that for the defence of rixa to succeed, the provocation should be of a serious character. [459] Neethling et al[460] have set out the requirements for provocation which have to be met. The requirements set out have an objective element. The test is that of a reasonable person. The questions that arise in the objective test:

i. Would a reasonable person, in the position of the defendant, react in the same manner after a defamatory remark;
ii. Secondly, the provocative remarks must have been prompt, or followed immediately after the provocation;
iii. And thirdly, the remarks must not be disproportionate to the provocation.[461]

The defence of Rixa was invoked in the case of *Bassingthwaighte v Kuhlmann*.[462] The Court, citing *Wood v Branson*[463] considered that the 'defamatory statement may be rebutted if it is proved that the statement was published in anger, without pre-meditation, provided that the statement is not persisted.' Other considerations that apply are when the retaliatory words were used, and whether the words were proportionate to the reputational damaged originally inflicted. The defence of provocation, will likely succeed, if the reaction was swift or spontaneous in response, and proportionate to the originally words used, and there was no persistence. In *Peck v Katz*[464] Marais J expressed the view that 'Rixa is a good defence to a defamation action if the only person or all the persons to whom the defamation statement was published, took it, on account of the defendant's palpable anger, to be mere meaningless abuse, not intended to be regarded as a statement of fact, or if, in the opinion of the Court, it could not reasonably have been regarded by them as a statement of fact.'[465] Most social media statements take this form. Users tend to be impulsive. Postings are often vague and could be misinterpreted prompting puerile outbursts that could be avoided. Issues degenerate, take a new twist, subsidise, and mutate into humour, with most participants letting bygones be bygones. Courts

[459] Feltoe *A Guide to the Zimbabwean Law of Delict* (2006) 65.
[460] Neethling et al *Law of Delict* (2015) 161.
[461] *Papas v Kimpton* 1931 NPD 114 118.
[462] *Bassingthwaighte v Kuhlmann* Unreported case no (EL 526/06) [2009] ZAECGHC 27 of 11 May 2009.
[463] *Wood v Branson* 1952 (3) SA 369 (T) 372.
[464] *Peck v Katz* 1957 (2) SA 567 (T) 573.
[465] Ibid.

ought to consider that people should be thin skinned, and less inclined to perpetuate online conflicts through litigation, which conflicts often dissipate like morning dew and get forgotten. Considerations should be made of naturally hypersensitive people, who can potentially over-react and amplify ordinary social media online conflicts.

3.3.6. Compensation or retaliation

Retaliation to a defamatory statement is a defence, if the defendant can demonstrate that he replied in equal measure.[466] This defence is yet to be determined in precedent in the Zimbabwean jurisdiction. In social media, there are often highly offensive trade-offs on either Twitter or Facebook. It would be appropriate to counter claim, should the other party sue for defamation. In this defence, that one reacted to a provocation and replied in equal measure could be sufficient defence.

3.3.7. Volenti non-fit injuria or consent

The Plaintiff should not encourage publication of harmful information against himself, and later sue for the same. This defence sufficed in *Fortune v African International Publishing Co. (Pvt) Ltd*.[467] The plaintiff challenged the defendant to publish information that had previously been discussed in private, where the information had been known within a confined and limited group of academics. By instigating the publication of defamatory words, the plaintiff could not be heard to complain of the resulting damage. There are instances on social media where individuals are challenged to publish defamatory materials. Should the result occur, litigants cannot be held to cry foul. On social media, users tend to challenge each other to publish information. The mental state of the participants varies as and when they will be using the social media platforms. Social media is used at any hour, platform or event. The courts in making a determination would need to consider the state of mind, in ascertaining whether consent was given or not.

3.4. Remedies available for defamation

[466] G Feltoe *A Zimbabwean Guide to the law of Delict* (2018).
[467] *Fortune v African international publishing co. (Pvt) Ltd* 1976 (2) RLR 223.

There are remedies available to the plaintiff who has suffered injury to his name as a result of the publication of a defamatory statement. The common remedies available include an interdict, retraction or apology, and damages to act as solatium to the plaintiff. An interdict can be granted if a possibility arises for publication of material that is potentially defamatory. The plaintiff can file an urgent application to stop the publication. The Zimbabwean courts[468] are however reluctant to grant an interdict and this is done under highly exceptional circumstances. Roman-Dutch Law upholds apology and retraction as a substantial remedy, Zimbabwean courts can grant an interdict or damages as remedies. The traditional common law remedy principles have been applied to online defamation cases. Their applicability was tested in *Manuel v EFF*[469] where the remedies for declaratory relief; interdictory relief; pecuniary relief; and an unconditional retraction and apology were considered.

3.4.1. Interdict for Defamatory Material

The courts are disinclined to grant orders restraining the media from publishing a story on the grounds that it is defamatory. The onus is upon the plaintiff to adduce evidence that the material to be published was false, and there were serious adverse consequences that would ensue as a result of the publication. The position was taken in *Universal Merchant Bank Zimbabwe Ltd v The Zimbabwe Independent & Another*.[470] The plaintiff sought an interim interdict, to bar the publication of a story, alleging that the bank was insolvent. The court refused to grant the order and advised there were alternative remedies the bank could pursue, in the event that story turned out to be false.

The same approach was taken in South Africa, where in *Manyatshe v M & G Media Ltd*,[471] an applicant for an interdict, who had to demonstrate that the intended publication will be defamatory, had to: 'satisfy the requirement of a prima facie right, unless the respondent who relies on some ground of justification laid a sustainable factual foundation for that defence.'[472] However, due care had to be taken with regards to that 'freedom of the press is not to be overridden lightly and weigh that up against the applicant's countervailing constitutional

[468] *Moyo v Muleya & Others* 2001 (1) ZLR 251 (H). See *also South Africa case Malema v Rampedi & Others* 2011 (5) SA 631. (GSJ).
[469] *Manuel v EFF* (note 9 above).
[470] *Universal Merchant Bank Zimbabwe Ltd v The Zimbabwe Independent & Another* 2000 (1) ZLR 234 (H).
[471] *Manyatshe v M & G Media Ltd and Others* Unreported case No (415/08) [2009] ZASCA 96 of 17 September 2009.
[472] Ibid.

right to protection of his or her reputation.'[473] The court reasoned the same in *Argus Printing & Publishing Co Ltd v Esselen's Estate*[474] where the status of an individual was weighed and considered to the extent that 'it goes without saying that the high profile of the individual involved should be taken into account in the balancing process. In fact, it could potentially add weight to both sides of the scale.'[475]

In *Schweppes v Zimpapers (1980) Ltd*,[476] Dumbutchena J, refused an interdict of the publication of a defamatory anonymous letter, whose contents were still being investigated by the journalists. It was difficult to ascertain if the letter might or might not be defamatory of the plaintiff. Dumbutshena referred with approval, quoting an English case *Roberts v The Critic & Others* [477] where Ward J held that the court had the power to grant an injunction against publication of libel. There are a number of factors that the court ought to consider, which include that it must first be satisfied that the material is defamatory, that the defence of truth for the public benefit could be satisfactorily mounted against the action, and that the plaintiff had not consented to the publication. If there is any doubt on these factors, the case is referred to trial.

In *Moyo* v *Muleya & Others*[478] the Court held that politicians, particularly cabinet ministers are more open to scrutiny. In an interdict to stop the publication of legal proceedings against the minister in a foreign jurisdiction, the Court held that the right to personal dignity and integrity and the right to freedom of speech are competing interests that had to be balanced. The same stance was taken in *Manyatshe v M&G* supra, where it was held that there should be little interference with the exercise of freedom of expression. A clear right, and reasonable prospects of success, would be established before a final interdict could be granted by the Court.

The locus classicus for an interdict, referred in Zimbabwean courts, is the South African authority of *Setlogelo v Setlogelo*.[479] When the interdict defining principles were set out in *Setlogelo* in the early 20th century, it was hardly imaginable that internet would emerge to

[473] Ibid.
[474] *Argus Printing & Publishing Co Ltd v Esselen's Estate* 1994 (2) SA 1.
[475] Ibid.
[476] *Schweppes v Zimpapers* (1980) Ltd 1987 (1) ZLR 114 (HC).
[477] *Roberts v The Critic & Others* 1919 WLD 26 28-20.
[478] *Moyo v Muleya & Others* 2001 (1) ZLR 251 (H).
[479] *Setlogelo v Setlogelo* 1914 AD 221.

disrupt the traditional communication print model, and introduce vast networks that send messages at a whim, with instant posting, pasting and removals and or deletions. The advent of the internet has rendered the remedy of an interdict difficult to implement. Information is relayed instantly and cannot wait the bureaucratic nature of court processes and consultations to mount an interdict to stop a publication of online material. Instead of seeking an interdict, the litigants can pursue litigation for damages, a retraction and or an apology after publication. In a way, social media has provided a robust, instantaneous advancement of free speech, which limits the extent to which public officers could interfere with free speech. Unlike on traditional print where the state could stop or ban newspapers from publishing,[480] or even allegedly bomb the printing press, social media broadens the scope for free speech by providing an effective and fast outlet to information.

In the *Manuel v EFF* case, the High Court ordered a 'permanent interdict' against the respondents over and above the punitive costs. A permanent interdict could have a chilling effect and be viewed as suppressive of free speech. In the *Manuel v EFF* case, though the permanent interdict was confined to a particular issue, and that the allegations raised by the defendants were not to be repeated ever again, the questions arise as to the effectiveness of the permanent interdict in the future when the same raised allegations are proven to be true? The implication is that the whole nation, and or the defendants targeted by the permanent interdict will still be constrained from commenting on the matter. The problematic aspect of social media is the capacity of the defendants to delete completely the damaging material. Technically, if the original tweet is deleted, it does remove all retweets from Twitter and the 'deletion of the original tweet does not remove the following: any tweets in which other persons have copied and pasted part or all of the text into their own tweet; retweets in which persons have added a comment of their own; and tweets which may be cached or cross-posted on third-party websites, applications or search engines.'[481] The damage remains permanent, even if court order would have been secured.

3.4.2. Apology and Retraction

[480] Media Institute of Southern Africa 'ANZ denied licence to resume publication of banned' *Daily News on Sunday* *Media Institute of Southern Africa (MISA) Online* 19 July 2005 Available at *https://ifex.org/anz-denied-licence-to-resume-publication-of-banned-daily-news-and-daily-news-on-sunday-newspapers/*, [Accessed on 18 May 2020].

[481] A Singh 'Social media and defamation online: Guidance from Manuel v EFF'. Insights Defamation, Freedom of Expression, Social Media, 31 July 2019 available at *https://altadvisory.africa/2019/05/31/social-media-and-defamation-online-guidance-from-manuel-v-eff,/* (Accessed 7 May 2020).

The Roman-Dutch principle of honorable amends[482] provided for the apology and retraction of defamatory words by the defendant. The *amende honourable* remedy has not been followed in Zimbabwe jurisdiction, as courts provide an interdict or damages as alternative remedies. The remedy has been referred to as a little treasure lost in a nook of our legal attic.[483] In *Murehwa v Nyambuya*, the Court considered whether any apology or retraction was tendered for the publication of the defamatory material in its assessment of damages. The same approach was been followed in *Shamuyarira v Zimbabwe Newspapers (1980) Ltd and Another*. [484]

The re-introduction of retraction and apology as a remedy has been a welcome development.[485] The concept of damages, Loubster and Midgley argue, does not strike a balance between freedom of expression and the right to reputation in that it fails to protect the reputation of the plaintiff and could impose restrictions on freedom of expression because damages could bring financial ruin to defendant.[486] Litigation is expensive and timeous. The reintroduction of such a remedy will save time, and money to the litigants involved. Importantly, it can effectively restore the damage to the reputation of the plaintiff.

The common law defences to defamation have been consistently applied in the Zimbabwean jurisdiction. The remedies available have not changed. The damages provided comparable to other jurisdiction have remained low, with the courts guided by the principle that the amounts are not meant to provide the plaintiff a pathway to riches,[487] but a vindication to the damaged reputation. The courts have consistently refused to draw comparisons with how other jurisdictions arrive at their figures for damages. [488] There is need to revisit some of the figures for defamation damages with the advent of the internet and consider the extent of the publication if the defamatory material also appeared online.

The defendant, in *Le Roux v Dey* were ordered to tender an unconditional apology for the electronically generated image. The same order was given in *Manuel v EFF*. An apology is quite effective for online defamation platforms which are as equally devastating as traditional

[482] Loubster and Midgley (note 42 above; 430).
[483] Ibid.
[484] *Shamuyarira v Zimbabwe Newspapers (1980) Ltd and Another* 1994 (1) ZLR 445 (H) 503 E-H.
[485] Loubster and Midgley (note 42 above; 430).
[486] Ibid.
[487] *Chidzambgwa v Zimpapers (1980) Pvt Ltd* Unreported Judgment HC 5369/06, 2008 handed down 31 December 2007.
[488] *Zvobgo v Modus Publications* (Pvt) Ltd 1995 (2) ZLR 96 (H) 113.

print newspapers. Social media, through tweets, or WhatsApp, have had a shattering effect. It's been said that: 'one angry tweet can torpedo a brand.'[489] The artificial person's reputation, is equally at risk, just like the natural person. Buffet once said: 'It takes 20 years to build a reputation and five minutes to ruin it. Arguably then, the most valued asset of an organization is its reputation. Reputations are fragile and difficult to form, develop, and maintain.'[490] An apology, can at least vindicate the name the plaintiff, though it doesn't completely wash off the dent. It is the only effective remedy, over and above financial damages. However, punitive costs can follow a defendant who refuses to comply with a court order to tender an apology online for a damaging tweet, or other social media generated attack.[491] The effect of a damaging tweet, is that it is capable of reaching millions of persons more instantaneously than printed copies of newspapers. In *Manuel v EFF*, the Economic Freedom Fighters had over 725 000 Twitter followers, and one of the defendants, Mr Malema, who retweeted the offensive tweet had over 2 million Twitter followers. Singh noted that: 'While the precise number of persons who viewed the tweet may not be known, the borderless nature of social media platforms certainly gives rise to the possibility to reach vast audiences around the world.'[492] An apology on the same platform, to the same audience, could help repair the damage. A court, when determining the quantification of damages, and ordering an apology, should take into consideration the reach and effectiveness of the social media platform in assuaging the damage done. The effectiveness of social media apology is in its spontaneity, speed, immediate consumption and openness. However, regardless, 'social media is no longer the adorable baby everyone wants to hold, but the angst-filled adolescent, still immature yet no longer cute who inspires mixed feelings.'[493]

3.5. Conclusion

This chapter sought to provide an overview of defences and remedies available to defamation and the concomitant challenges presented by the digital era. Emerging issues to be discussed in greater detail in the coming chapters and will expand on considerations around liability of

[489] J Bernoff & Schadler 'Empowered' (2010) *Harvard Business Review.* 95.

[490]The 16 best things Warren Buffet has ever said. (2013 August 30) *Huffington Post,*, from *http:// www.huffingtonpost.com/2013/08/30/warren-buffet*, (Accessed 30 August 2015).

[491] *Manuel v EFF* (note 9 above).

[492] A Singh 'Social media and defamation online: Guidance from Manuel v EFF'. Insights Defamation, Freedom of Expression, Social Media, (31 July 2019) available *at https://altadvisory.africa/2019/05/31/social-media-and-defamation-online-guidance-from-manuel-v-eff/,* (Accessed 7 May 2020).

[493] IBM Software 'Thought leadership White Paper, New York, USA' *IBM Unica* (2011). *Key marketing trends for 2011.*

the ordinary social media user and service providers, the effect of republication and anonymity of social media contributors, retraction, apology and efficacy of orders to remove defamatory content and effect of extent of publication of the contentious material. However, the chapter has sought to provide the general traditional defences available under common law. These defences will be referred to in greater detail as analysis is made on how they can relate and or adjust to emerging technological developments brought by the internet.

The next chapter shall explore how international institutions and regional organs have responded to the developments in the digital era through creations of model laws designed to facilitate uniformity in addressing loopholes created by the emergence of social media.

Particular focus will be made on the United Nations' adopted new Mode Law on Electronic Commerce, with a guide to enactment. The Model Law on Electronic Commerce which was adopted by the United Nations Commission on International Trade Law seekS to adopt and regulate electronic commerce as an alternative to paper based methods of communication and storage of information.[494] The UNCITRAL noted that it sought to establish a model law facilitating the use of electronic commerce that is acceptable to states with different legal, social and economic systems that could contribute significantly to the development of harmonious international economic relations.[495] While the Model Law seeks to facilitate economic trade with nations adapting to the digital era, some of the principles it advances seek to harmonise traditional principles around defamation with cyber digital technology.

Focus will also be made on the The Convention on Cybercrime, also known as the 'Budapest Convention'[496] which was the first treaty to make an attempt at addressing crimes committed through the internet. While the convention principles apply to the criminal usage of the internet and violations of network security, more importantly, it enlists various powers and procedures aimed at searching computer networks and lawful interception. Its main objective is to pursue a 'common criminal policy aimed at the protection of society against cybercrime,

[494] UNCITRAL Model Law on Electronic Commerce with Guide to Enactment 1996 available at https://www.uncitral.org/pdf/english/texts/electcom/05-89450_Ebook.pdf, (Accessed on 8 May 2020).
[495] Ibid (note 129 above).
[496] The Budapest Convention 'Convention on Cybercrime Budapest, 23.XI.2001' available at *https://www.europarl.europa.eu/meetdocs/2014_2019/documents/libe/dv/7_conv_budapest_/7_conv_budapest_en.pdf,* [Accessed 8 May 2020].

especially by adopting appropriate legislation and fostering international cooperation,' and, 'Providing for domestic criminal procedural law powers necessary for the investigation and prosecution of such offences as well as other offences committed by means of a computer system or evidence in relation to which is in electronic form.'[497] The targeted offences in the Budapest convention related to, inter alia, 'illegal access, illegal interception, data interference, system interference, misuse of devices, computer-related forgery, computer-related fraud, offences related to child pornography, and offences related to copyright and neighboring rights.'[498]

The last model law to be examined is the SADC Model Law on Electronic Commerce that seeks to address the same, albeit at regional level. The three international interventions have a significant bearing on the current study, as all the three model laws seek to address the uncertain, fickleness and lack of regulatory mechanism within the cyberspace. There is a prevailing argument that regional bodies will have to adopt highly adaptive laws, if they are to successfully regulate activities in the digital ecosystem.[499]

Observations have been made by academics that 'In the next decade, as the Southern African Development Community (SADC) region shifts to Internet-based life, it will encounter high levels of complexity in economic, social and institutional systems, requiring regulators to anticipate disruptive change and frame regulation for a digital complexity ecosystem.'[500]

[497] Ibid.
[498] Ibid.
[499] L Abrahams 'Regulatory imperatives for the future of SADC's "digital complexity ecosystem"' (2017) 20 *The African Journal of Information and Communication.*
[500] Ibid.

CHAPTER FOUR

INTERNATIONAL BEST PRACTICE MODEL LAWS CONCERNING CYBERSPACE

4.1. INTRODUCTION

This chapter seeks to give an overview of how the United Nations and other regional bodies have responded through the creation of model laws to the exponential growth in internet usage, and its attendant legal implications that have created a legislative lacuna in its wake. It is important to make a distinction between a model law and a convention. A model law is 'created as a suggested pattern for law-makers in national governments to consider adopting as part of their domestic legislation' and a convention 'is an instrument that is binding under international law on States and other entities with treaty-making capacity that choose to become a party to that instrument.'[501] A model law, also known as a uniform law, 'is a proposed series of laws pertaining to a specific subject that the states may choose to adopt or reject, in whole or in part. If a state adopts the model law**,** then it becomes the statutory law of that state.'[502] It appears that model laws which were crafted by different world organisations following rapid growth of the internet had a substantial bearing on cyber-crime, leaving cyber defamation to be developed as offshoots of common law.

The United Nations Commission on International Trade Law adopted a model law on Electronic Commerce (hereinafter 'Model Law on E-Commerce')[503] which sought to regulate electronic commerce in international trade as a substitute to paper methods of communication. There are key Model Law on E-Commerce regulatory concepts that could be adopted to guide the development of common law on cyber defamation.

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[501] United Nations Commission on International Trade Law Available at *https://uncitral.un.org/en/about/faq/texts* (Accessed on 2 July 2020).

[502] IT Law Wiki Available at *https://itlaw.wikia.org/wiki/Model_law#:~:text=Definition,statutory%20law%20of%20that%20state.*, (Accessed on 2 July 2020).

[503] UNCITRAL Model Law on Electronic Commerce (1996). The Model Law on Electronic Commerce (MLEC) purports to enable and facilitate commerce conducted using electronic means by providing national legislators with a set of internationally acceptable rules aimed at removing legal obstacles and increasing legal predictability for electronic commerce.

The Convention on cyber-crime,[504] was the first international treaty pursuing the aim of addressing computer related crimes. It sought to achieve this through the harmonisation of domestic legislation and by allowing more collaboration among states. Like the Model Law on E-Commerce, the Budapest Convention, even though it seeks to address cyber-crime, has important concepts that could be explored in the development of defamation in common law.

The chapter will also consider policies concerning the harmonisation of information and communication technologies in sub-Saharan Africa. One such policy is the Southern Development Community (SADC) Model Law on Computer Crime and Cybercrime(hereinafter 'SADC Model Law').[505] The SADC Model Law sought to criminalize and investigate computer network related crimes. The three model laws are significant concepts to interrogate in the development of defamation in common law. The legal documents are a testament to the fact that African countries, particularly Zimbabwe, have been slow in adapting to the developments in the digital era. The previous chapter sought to provide an overview of the remedies and damages associated with the law of defamation in Zimbabwe. This chapter will seek to address how defamation law could be further developed at common law, using international best practice from the aforementioned model laws. The approach will not be the wholesale incorporation of the model laws, but rather a piecemeal approach that meets the considerations of each developing litigation through the adoption and application of international best practice.

4.2 UNCITRAL Model Law on E-Commerce

The Model Law on E-Commerce with a guide to enactment, was adopted by the United Nations Commission on International Trade Law (UNCITRAL), seeking to adopt and regulate electronic commerce as an alternative to paper-based methods of communication and storage

[504]Convention on cybercrime, Budapest, 23.X1.2001. The Budapest Convention was negotiated by the Council of Europe (CoE) Member States as well as Canada, Japan, South Africa and the United States. It was adopted by the CoE's Committee of Ministers at its 109th session, on 8 November 2001, opened for signature in Budapest less than two weeks later, on 23 November 2001 7 and entered into force on 1 July 2004. Convention on Cybercrime' Available at *https://www.refworld.org/docid/47fdfb202.html,* (Accessed on 22 April 2020).

[505] Establishment of Harmonized Policies for the ICT Market in the ACP Countries Computer Crime and Cybercrime: Southern African Development Community (SADC) Model Law Available at *http://www.veritaszim.net/sites/veritas_d/files/SADC%20Model%20Law%20on%20Computer%20Crime%20and%20Cybercrime.pdf,* (Accessed 2 May 2020).

of information.[506] This Model Law, unlike the Budapest Convention, is not an international treaty. It seeks to remove preventable impediments to international trade caused by inadequacies and divergences in the law affecting trade. This inevitably prompted the need to harmonise and unify international trade law. The Model Law E-Commerce was a reaction to the rapid use of computerised communications between parties and other modern techniques in doing business. It consequently served as a model to countries for the evaluation and readjustments of members' municipal laws and practices in the field of commercial relationships involving the use of computers, and importantly: 'for the establishment of relevant legislation where none presently exists.'[507] There was therefore a need for a certain, coherent and harmonised international legal system. The Model Law E-Commerce was also drafted to provide a guide for individual countries in preparing their own national legislative response.

The significance of having countries adapting and embracing information technology data messages is part of this Model Law's recommendation which seeks to 'review the legal rules affecting the use of computer records as evidence in litigation in order to eliminate unnecessary obstacles to their admission to be assured that the rules are consistent with developments in technology, and provide appropriate means for a court to evaluate the credibility of the data contained in those records.'[508] There was also a realisation that in many countries existing legislation which govern 'communication and storage of information is inadequate or outdated because it does not contemplate use of electronic commerce.'[509] The current legislative framework in Zimbabwe, cannot adequately cater for developments in the digital era, and may have difficulties dealing with cyber defamation, hence the current attempts at drafting the Cyber Bill.[510]

The Model Law E-Commerce was part of bringing in a change in cyber space, crafting law on information technology, building internet law jurisprudence to create order in cyber space. The Model Law E-Commerce noted that it sought to establish: '… a model law facilitating use of electronic commerce that is acceptable to states with different legal, social

[506]UNCITRAL (Note 3 above).
[507]Ibid. (note 1 above; 65).
[508]Ibid. (note 1 above; 65).
[509]Ibid. (note 1 above; 16).
[510]Lloyd Gumbo 'Cyber Crime bill: The Details' The Herald 17 August 2016 Available at *https://www.herald.co.zw/cyber-crime-bill-the-details/* (Accessed 23 April 2020).

and economic systems, could contribute significantly to the development of harmonious international economic relations.'[511] While it seeks to facilitate economic trade, with nations adapting to the digital era, some of the principles it advances indirectly and fortuitously seek to harmonise traditional principles around defamation with developments in the cyber digital technology era. This arises because it recognises that: '… in a number of countries the existing legislation governing communication and storage of information is inadequate or outdated because it does not contemplate the use of electronic commerce.'[512] The idea behind the model is not to encourage 'wholesale removal of the paper-based requirement, or disturbing the legal concepts and approaches underlying those requirements.'[513] But it contemplates providing a complimentary role to existing paper-based rules for evidential purposes, though it also seeks to validate transactions that are executed by information communication technologies.

The significance of having countries adapting and embracing information technology data messages is part of the Model Law's recommendation which seeks to 'review the legal rules affecting the use of computer records as evidence in litigation in order to eliminate unnecessary obstacles to their admission to be assured that the rules are consistent with developments in technology, and provide appropriate means for a court to evaluate the credibility of the data contained in those records.'[514] The current legislative framework in Zimbabwe, cannot adequately cater for developments in the digital era, and may have difficulties dealing with cyber defamation, hence the latest approaches aiming at drafting the Cyber Security and Data Protection Bill.[515] The main aim behind the drafting of the cyber bill, was a realisation by the Zimbabwe government that the current legislative framework, as it relates to case law, common law and even statutory law, is not sufficient to deal with digital era developments. The preamble to the Cyber Bill says:

> 'The purpose of this Bill is to consolidate cyber related offences and provide for data protection with due regard to the Declaration of Rights under the Constitution and the public and national interest, to establish a Cyber Security Centre and a Data Protection Authority, to provide for their functions, provide for investigation and collection of evidence of cybercrime and unauthorised data collection and breaches, and to provide for admissibility of electronic evidence for such offences. It will create a technology

[511] UNCITRAL Model Law E-Commerce (note 1 above; 1).
[512] Ibid. (note 1 above; 16).
[513] Ibid. (note 1 above; 20).
[514] Ibid. (note 1 above; 31).
[515]Nick Mangwana 'The case for internet regulation' The Herald 16 August 2016 Available at https://www.herald.co.zw/the-case-for-internet-regulation/. Accessed on 22 April 2020).

driven business environment and encourage technological development and the lawful use of technology.'[516]

There is a strong realisation by scholars that in the next decade, as the Southern African Development Community (SADC) considerably shifts to 'Internet-based life', it will encounter high levels of complexity in economic, social and institutional systems, requiring regulators to anticipate disruptive change and frame regulation for a 'digital complexity ecosystem.'[517] The complexity of the problems, it's envisaged, will encompass uncertainty, unpredictability requiring global economic reforms with innovation in digitally-supported communications leading to the generation of complex, adaptive forms of digital commerce and digital government.[518]

It has been noted that internet or social media usage, has significantly shifted from computers to mobile telephony (voice and text) and access on the African continent has increased and was estimated at 420 million unique mobile subscribers, or a 43% penetration rate, at the end of 2016.[519] Mobile Internet subscriber penetration is estimated at 28% for the whole of Africa,[520] and the total Internet penetration at 31% in 2017[521] indicating that internet penetration is largely mobile. With increased usage of the mobile phones, comes with it access to social media platforms where defamatory materials are constantly posted in different jurisdictions, hence the calls for countries to respond in a manner that adapt to the digital era.

The purpose of the Model Law E-Commerce was to offer national legislators a set of internationally acceptable rules as to how a number of internet related legal obstacles may be removed, and how a more secure legal environment may be created for what has become known as 'electronic commerce'. As such, several important principles have developed which are crucial for the purposes of this study. Of importance is the 'principle of equivalence' which entails that legislators should not, in regulating online activities, place online activities in a

[516] Ibid.
[517] L Abrahams 'Regulatory Imperatives for the Future of SADC's 'Digital Complexity Ecosystem' (2017) *African Journal for Communications Issue 20*.
[518] Ibid.
[519] Ibid.
[520] Ibid.
[521] Ibid.

more or less favourable position to that of offline activities. Instead, the same norms that apply in the offline world should apply in the online world.[522]

4.2.1 Functional Equivalence

An important fundamental principle that arises under Model Law E-Commerce is the principle of functional equivalence.[523] The principle carries significance in Information and Communications Technology regulation.[524] There are at least four areas it seeks to address:

a. The statement implies that the internet carries no God like status and ought to be regulated, as it forms part of society;
b. Secondly, it is a method that should locate an offline rule to an online situation;
c. Thirdly, it is a practical guideline used to create rules for online situations; and
d. Fourthly it is a policy statement. That is, a familiar legal background must be created online for the purpose of achieving extra-legal online policy objectives. The policy statement sets out norms which will guide online users in their activities.

The background to the development of the principle is that states, ought to adapt their legislation to developments in communication technology without, '… wholesale removal of the paper-based requirements themselves or disturbing the legal concepts and approaches underlying those requirements.'[525] The principle seeks to fulfil the purposes and functions of the traditional paper-based approach in an electronic based technique. Data messages are meant to enjoy the same level of recognition as paper based, even though they may not carry important aspects for evidential purposes such as signatures, writing and originality. When using electronic based communication for evidential purposes, even in civil proceedings, if the offending material does not contain a signature, and is not in written form, it can be as binding to the authors if the same functional equivalence rule were applied. The Model Law on E-Commerce notes that courts in different jurisdictions, may adopt the Model Law, and enact it as part of their body of legislation, but it ought to be 'interpreted in reference to its international

[522] S van der Hof 'The Status of eGovernment in the Netherlands' (2007) 11 *Electronic Journal of Comparative Law* 13.
[523] UNCITRAL E-Commerce Article 5. Legal recognition of data messages 46. Article 5 embodies the fundamental principle that data messages should not be discriminated against, i.e., that there should be no disparity of treatment between data messages and paper documents.
[524] Ibid. (note 21 above).
[525] Ibid. (note 1 above;20).

origin in order to ensure uniformity in the interpretation of the Model Law in various countries.'[526]

Legislators are encouraged to use the equivalence principle to apply an existing offline rule to an online situation, which is referred to as equivalence of form and alternatively, they can use it to formulate a new law for an online situation, which is referred to as functional equivalence. [527] In equivalence form, 'if off-line and on-line cases are equivalent, they must be dealt with similarly. Consequently, a particular rule which deals best with a situation offline will apply to regulate an equivalent situation online. This equivalence form, by way of an example, is illustrated with the case of a bookshop and an internet service provider (hereinafter 'ISP'). Rules on liability of a bookshop for defamatory content in books it distributes will apply to an ISP as both are distributors of material without knowledge and editorial control of distributed content.[528] This approach is the same with the current law of defamation, on the liability of distributors to defamatory published content in a newspaper.[529] The equivalent approach can be used in developing the common law on the liability of ISPs. However, several precedents have adopted this approach.[530] This means an offline principle, related to liability of bookshop owner, will apply to an online situation, in relation to an ISPs, who is only hosting a service.

The liability of ISPs has been a problematic issue at law, since the advent of the internet. As Maxson observed:

> 'Modern communication technology is changing today's world. As the world around us changes, the law needs to adapt to meet the challenges of new technology. Both the courts and legislatures have failed thus far in their attempts to adapt to these changes. Defamation in cyberspace needs a clear set of workable principles to guide this new communication medium.'[531]

Maxson then offered a set of guidelines which will limit the liability of BBS operators to situations in which the BBS operator is either negligent or allows anonymous postings on its BBS. This will relate

[526] UNCITRAL Model Law e-commerce (note 1 above;30).
[527] Ibid. (note 1 above,20).
[528] J Burchell *Personality Rights and Freedom of Expression: The Modern Actio Injuriarm* (1998) 126.
[529] *Mudede v Ncube and Others* unreported case no (HH 143-2004) [2004] ZWHHC 143 of 27 July 2004.
[530] *Zeran v America Online Inc* 129 F 3d 327 (4th Cir 1997) 330.
[531] FP Maxson 'A Pothole on the Information Superhighway: BBS Operator Liability for Defamatory Statements' (1997) 75 *Washington University Law Review Consumer Protection and the Uniform Commercial Code.*

to circumstances where an BBS operator removes the defamatory posting and allows the defamed a chance to respond to, the defamatory posting. This will provide a shield for a BBS operator from liability. Maxson believes that the guidelines offer a simple solution that will be easy for BBS operators to follow, and which will allow free and open communication to flourish in cyberspace while still allowing the defamed individual the right to protect her reputation.[532]

The original problem on the liability of ISPs that followed the afforested article was the United States case of *Stratton Oakmont Inc. v Prodigy Services Co*,[533] which erroneously held that ISPs could be held accountable.[534] In the *Stratton* case, the New York Supreme Court held that Prodigy, as an online ISP, was liable as the publisher of content provided by its users, as it exercised editorial control through screening and or editing of material posted. This decision in *Stratton* case, was in conflict with a decision held in a 1991 federal district court decision in *Cubby Inc. v CompuServe* Inc,[535] which had held that online service providers were not publishers and should be considered like a digital library than actual publishers and should not be held accountable for user generated content. But in the Prodigy case, the court held that the ISP was a publisher of the material as it exercised editorial functions to regulate some of the posted material, hence it was liable for defamation. The traditional common law principle absolved distributors of newspapers, or any published material if they could demonstrate that they were not negligent or aware that the material published was defamatory.[536] At least the functional equivalence principle highlighted above could put the *Stratton* matter to rest. However the enactment by the United States of Section 230 of the Communications Decency Act in 1996, following the prevailing traditional common law principles, overruled the decision in *Stratton* case, and as a result, ISP in the United States are generally protected from liability for user-generated content.

4.2.2 Technology neutrality

Technology neutrality is regarded as a key principle for internet policy. This principle first emerged around 1986 in the United States (hereinafter 'the US') where it was used to express

[532] Ibid.
[533] *Stratton Oakmont Inc. v Prodigy Services Co* 1995 WL 323710 (NY. Sup.Ct. 1995)
[534] Ibid.
[535] *Cubby Inc. v CompuServe* Inc 776 F. Supp. 135 (S.D.N.Y. 1991).
[536] *Zvobgo v Kingstons Ltd* 1986 (2) ZLR 310 (H) 17.

the objectives of the US Electronic Communications Privacy Act.[537] The US Framework for Global Electronic Commerce (1997) subsequently supported the conception stating that online regulation must be technology neutral.[538] Within the ICT regulatory framework, technology refers to the specific types of 'technologies that store, transmit and/or process information and communication…in particular electronic data processing technologies.'[539] Technology neutrality in regulation, has three imports, which are the 'purposes' of online regulation, the consequences of regulation that a lawmaker should avoid, and thirdly, it elucidates the principles necessary in legal drafting of ICT regulation.[540] There are pitfalls that the neutrality principle in its regulatory effect should however avoid. The issues of concern are the need to avoid discriminating between technologies and that it should not hamper development of new technologies.[541]

Applying this principle to the law of defamation, there is need to consider that in developing common law in the digital era, discriminatory approaches could be harmful. There is need for uniformity in the application of principles to all social media. All social media platforms are equal in importance, despite their overall reach.

There is also need to promote free speech, and to avoid developing common law rules that will hamper its advancement. In hostile state environments, social media platforms may be shut, as repressive laws take precedence over free speech. There are jurisdictions[542] that have adopted this hostile approach, shutting out social media platforms, regulating, discouraging, and or suppressing them that has provoked a huge outcry. There are instances however, where it can be justifiable by ISPs or social media platforms to shut down specific

[537]*RK Matsepo An analysis of the regulatory principles of functional equivalence and technology neutrality in the context of electronic signatures in the formation of electronic transactions in Lesotho and the SADC region*. (unpublished LLD thesis, University of Cape Town, 2017).

[538]'Framework for Global Electronic Commerce' (1 July 1997) available at *http://www.ecommerce.gov/framewrk.htm*, [Accessed on 6 March 2014].

[539] R K Matsepo (note 37 above).

[540] RK Matsepo (note 37 above).

[541]The European Commission 'Towards a new framework for Electronic Communications infrastructure and associated services' The 1999 Communications Review COM (1999) 539 available at *http://eurlex.europa.eu/legal-content/EN/TXT/?uri=URISERV%3Al24216*, [Accessed on 25 November 2016].

[542] Anthony Cuthbertson 'WhatsApp worst hit by Internet shutdowns' The Independent 8 January 2020 Available at https://www.independent.co.uk/life-style/gadgets-and-tech/news/whatsapp-down-outage-internet-shutdown-latest-update-a9275301.html, (Accessed on 22 April 2020).

social media sites in the interests of peace and harmony.[543] However, in developing legislation, the technology neutrality principles should be adopted as they advocate for a delineable statutory or common law framework. This will enable the crafting of a law that is transparent and certain, which can be assimilated and fit into an existing coherent legal system.

The principles of functional equivalence, non-discrimination, and technological neutrality are now widely regarded as the founding elements of modern electronic commerce law, whose applicability resonates with legal imperatives in the development of cyber defamation law. However, the Model Law E-commerce is not designed to cover every facet of electronic commerce. There is need by states to adopt necessary principles and adapt accordingly.

4.3 The Convention on Cybercrime, also known as the Budapest Convention.

The Budapest Convention[544] was the first treaty[545] to make an attempt at addressing crimes committed through the internet. While the Budapest Convention's approach apply to the criminal usage of the internet and violations of network security, more importantly, it provides for various powers and procedures aimed at searching computer networks and making lawful interceptions of criminal activities.[546] Its main objective, which has been set out in the preamble, is to pursue a 'common criminal policy aimed at the protection of society against cybercrime, especially by adopting appropriate legislation and fostering international cooperation,'[547] and, 'Providing for domestic criminal procedural law powers necessary for the investigation and prosecution of such offences as well as other offences committed by means of a computer system or evidence in relation to which is in electronic form.'[548]

The targeted offences in the Budapest Convention relate to, inter alia, 'illegal access, illegal interception, data interference, system interference, misuse of devices, computer-related

[543] The Editorial Board 'Social media sites and the world's most repressive regimes' OCR 21 August 2019 Available at *https://www.ocregister.com/2019/08/21/social-media-and-the-worlds-repressive-regimes/*, (Accessed on 22 April 2020).
[544] The Budapest Convention (note 2 above).
[545] Ibid.
[546]Ibid. Budapest Convention: (note 2 above) Title 4 – Search and seizure of stored computer data Article 19 – Search and seizure of stored computer data.
[547] Ibid (note 2 above; 1).
[548] Ibid (note 2 above; 1).

forgery, computer-related fraud, offences related to child pornography, and offences related to copyright and neighboring rights.'[549] While the convention seeks to address cyber related criminal matters, it can be argued that organisations or ISPs should or can be subpoenaed to provide critical evidence in civil proceedings that is if the contentious communication in a computer system arises between parties in different jurisdictions. Even if the evidence is in electronic form, the Budapest Convention, just like the UNICITRAL, it seeks to validate it and give it effectiveness.

There are however similarities in approach to current common law positions between the two model laws in relation to jurisdiction. Article 22, of the Budapest Convention seeks to establish jurisdiction where any offence has been committed 'in its territory,' 'by any of its nationals, if the offence is punishable under criminal law where it was committed or if the offence is committed outside the territorial jurisdiction of any state.'[550]

While the treaty specifically addresses criminal matters, there are principles that can be adopted from the convention and adapted to suit civilly actionable matters related to cyber defamation. Aspects on jurisdiction, where if the offensive or contentious information was written in a foreign jurisdiction, but downloaded in another, or published there, jurisdiction can be established.[551] There can be cooperation amongst states for information needed in civil cases for evidential purposes.

The UNCITRAL Model Law on E-commerce, and the EU Budapest Convention on Cybercrime,[552] provides a general framework for the development of common law, with its principle of functional equivalence. Some of the principles could be adopted and adapted to provide complimentary and workable legislative frameworks that conforms to the new forms of the digital era. Similar principles have been adapted into regional computer related model law, like the SADC Model Law on Computer Crime and Cybercrime This model law seeks to harmonise ICT polices in sub-Saharan Africa.[553] The SADC Model Law states that 'the fact

[549]Budapest Convention: (note 2 above; Chapter II: Articles 2, 3. Offences against the confidentiality, integrity and availability of computer data and systems.)
[550] Ibid (note 2 above : Article 22).
[551] Ibid (note 2 above ; Section 3 Jurisdiction Article 22); Where the treaty says: 'Each Party shall adopt such legislative and other measures as may be necessary to establish jurisdiction over any offence established in accordance with Articles 2 through 11 of this Convention, when the offence is committed: a in its territory; or b on board a ship flying the flag of that Party; or c on board an aircraft registered under the laws of that Party.'
[552] Budapest Convention (note 2 above).
[553] HIPSSA: SADC model law (note 3; 13).

that evidence has been generated from a computer system does not by itself prevent that evidence from being admissible.'[554]

However, the Budapest Convention is not without weaknesses. As of March 2016, 48 states had ratified the Convention. An additional six states have signed, but not ratified it – this includes South Africa, one of the original negotiators. The Convention was tragically drafted without extensive input from developing countries.[555] It has been argued that, if the Convention includes only a limited number of offences in its section on substantive law, this is simply because on other offences, a minimum consensus could not be reached. [556]

Jurisdictional issues apply, on the applicability of the Convention, which may extend to bringing liable offenders in civil proceedings to account. The intrusive nature of the Convention in providing for extraterritorial interventions in the production of information stored in computers elsewhere raised sovereignty issues. Russia, raised a cause for concern and been the main reason for its decision not to sign the treaty, as it believes that it violates the country's sovereignty. This relates to Article 32,[557] which deals with trans-border access to stored computer data with consent or where publicly available.

4.4. Hipssa: Harmonization of the ICT policies in Sub-saharan Africa project

The United Nations Commission on International Trade Law had set the pace for the development of law, which is designed to plug the loopholes created by the advent of the digital era. The vehicle for this has been the UNCITRAL Model on E-commerce. Most subsequent conventions have been centered around cybercrime, particularly the Budapest Convention.[558] At regional level, Zimbabwe, which is part of the regional Southern African Development Community (hereinafter 'SADC') organ, lagged behind in addressing the concomitant

[554] Ibid (note 3 above 13).
[555] A Kovaks 'India and the Budapest Convention. To sign or not? Considerations for Indian Stakeholders' Internet Democracy Project Available at https://internetdemocracy.in/reports/india-and-the-budapest-convention-to-sign-or-not-considerations-for-indian-stakeholders,/ [Accessed 23 April 2020.]
[556] Ibid (note 48 above; 7).
[557] Budapest Convention (note 2 above; Article 32) which states: 'A Party may, without the authorisation of another Party: a. access publicly available (open source) stored computer data, regardless of where the data is located geographically; or b. access or receive, through a computer system in its territory, stored computer data located in another Party, if the Party obtains the lawful and voluntary consent of the person who has the lawful authority to disclose the data to the Party through that computer system.
[558] Budapest Convention (note 2 above).

problems associated with legislation in the cyber space. SADC regulators had to respond in a correspondingly complex, adaptive manner. Scholars made observations that 'regulatory institutions that fail to build and command such knowledge will run the risk of becoming all but irrelevant to the emergent digital ecosystem. This risk is already apparent in the SADC region, where the pace of change is poised to test the capacity of regulators to advance the supporting regulatory agenda at the required pace.'[559]

The SADC Model Law on Computer Crime and Cybercrime is a product of the Harmonization of the ICT Policies in Sub-Saharan Africa (HIPSSA) project on computer crime and cyber-crime . HIPSSA was developed in response to African economic integration and regional regulation associations' request for assistance in harmonisation of ICT policies and rules in Sub-Saharan Africa. There are significant lessons that could be drawn from the SADC Model Law in the development of the common law defamation. The next section sets out the regulatory dimensions followed by the SADC Model Law in addressing the lacuna at law. The proposed legislative framework under the model law, primarily addresses cyber-crime. However, as shall be discussed later, common law around cyber defamation could be developed from the international best practice, around the SADC Model Law.

4.4.1 The Sadc Model Law

Information and communication technologies are influential in shaping global interaction patterns. Ministers responsible for ICTs, under the African Union (AU) adopted a reference framework for the harmonization of ICT policies, and legislative frameworks.[560] The Sadc Model Law, targeted the criminal activities around the cyber space whose objective was criminalization and investigation of computer and network related crime. Zimbabwe is in the process of enacting Cyber-Crime Bill, [561] along the Sadc Model Law framework.

The Sadc Model Law has significant role in the formulation of common law on cyber defamation. It does have elements that resonate with the traditional common law principles that

[559]L Abrahams (note 15 above).
[560] The Ministers, under the African Union auspices met in May 2008, Addis Ababa.
[561] Media Institute of Southern Africa 'MISA-Zimbabwe commentaries on The Cyber crime and Cyber security Bill' 27 December 2018 Available at .*https://crm.misa.org/upload/web/misa-zimbabwe-commentaries-on-the-cybercrime-and-cyber-security-bill-2017_december-2018.pdf,* (Accessed on 22 April 2020).

have been used in many precedents in the defamation law. The recognition of creating criminal law models around digital developments, raises in equal measure a possibility of crafting similar legislation around civil and common law.

Sadc Model Law Article 12[562] relates to loss of property, through computer related misdemeanors. It involves a person intentionally, and without lawful excuse or justification causes a loss of property to another person by deletion or suppression of computer data and or interference with the functioning of a computer system, with fraudulent or dishonest intent of procuring. This article alludes to loss of a financial nature, in relation to loss of property, which has a pecuniary value. While the articles envisage criminal conduct, the plaintiff can claim for special damages if the loss of property which is part of a business production process is quantifiable. There can also be quantification of an award for special damages around a defamatory article, if the loss in business is ancillary to the offending article. In special damages, it is important that the plaintiff alleges and prove special damages arising from the publication as distinct from general damage to reputation. Special damages capable of exact calculation are generally called special damages, or liquidated demand. General damages naturally flow from the wrong and are of a non-pecuniary nature, such as, pain and suffering, or *contumelia*.[563] Special damages for business losses are typically calculated by measuring the difference between the plaintiff's actual earnings after the false communication compared with their projected earnings had the defamation not occurred.[564] The actual loss of customers or business as a result of the defamatory remark is a prime example of special damages.[565] The concomitant occurrence has to be proved at law, as opposed to general damages, where quantification damages is a rule of thumb.

Equally so, damages can arise from computer related impersonation, if the plaintiff can prove, that as a result of the defendant's actions, his reputation, self- esteem was lowered or exposed to ridicule. Sadc Model Law Article 15 however provides a criminal sanction to a

[562]HIPPSSA Sadc ML (note 3: Article 12) The section relates to causes loss of property, through computer related misdemeanours. 'A person who intentionally, without lawful excuse or justification or in excess of a lawful excuse or justification causes a loss of property to another person by: (a) any input, alteration, deletion or suppression of computer data; (b) any interference with the functioning of a computer system, with fraudulent or dishonest intent of procuring, without right, an economic benefit for oneself or for another person the penalty shall be imprisonment for a period not exceeding [period], or a fine not exceeding [amount], or both.'

[563] *Mandlbaur v Papenfus* (High Court) unreported case no [2014] ZAGPPHC 945 of 8 October 2014. Para 62 and 64.

[564] *Storms Bruks Aktie Bolag v Hutchinson* [1905] AC 515 525-526.

[565] R Hankin 'Special Damages' (1966) 43*Chicago-Kent Law Review*.

person who, 'intentionally without lawful excuse or justification or in excess of a lawful excuse or justification by using a computer system in any stage of the offence, intentionally transfers, possesses, or uses, without lawful excuse or justification, a means of identification of another person with the intent to commit, or to aid or abet, or in connection with, any unlawful activity that constitutes a crime, commits an offence punishable, on conviction.'[566]

Articles 16 and 17 of the Sadc Model Law, seeks to penalise utterances or conduct which results in racist and or xenophobic material and or insults. The internet has been subject of abuse, with often racist postings[567] and or utterances that attract criminal liability. There are however remedies for defamatory racist remarks on social media which include but is not limited to an interdict[568] and subsequent punitive damages.[569] There are both civil and criminal liability[570] for making racists remarks which can also take the form of xenophobic motivated insult. Under Article 17,[571] the Sadc Model Law raises criminal liability for a person. Under Article 19,[572] a person who intentionally without lawful excuse or justification, causes the transmission of multiple electronic mail messages through a computer system; and relay or retransmit multiple electronic mail messages, with the intent to deceive or mislead users, or any electronic mail or Internet service provider, and or materially falsifies header information in multiple electronic mail messages and intentionally initiates the transmission of such messages." Defamation action can arise, if, under the identity of ISP, wrongful, reputational

[566] SADC Model Law Article 15.

[567] *ANC v Sparrow* (Magistrate Court) unreported case no (01/16) [2016] ZAEQC 1 of 10 June 2016.

[568] *Wierzycka and Another v Manyi* (High Court) unreported case no (30437/17) [2017] ZAGPJHC 323 of 20 November 2017.

[569] *Strydom v Chilwane* 2008 (2) SA 247.

[570] Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, section 10(1) of the Equality Act prohibits hate speech and provides: 'No person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds against any person that could reasonably be construed to demonstrate a clear intention to a) be hurtful; b) be harmful or to incite harm and c) promote or propagate hatred."

[571] HIPSSA Sadc Model Law 'Article 17: a person who, 'intentionally without lawful excuse or justification or in excess of a lawful excuse or justification insults publicly, through a computer system, (a) persons for the reason that they belong to a group distinguished by race, colour, descent or national or ethnic origin, as well as religion, if used as a pretext for any of these factors; or (b) a group of persons which is distinguished by any of these characteristics commits an offence punishable, on conviction, by imprisonment..'

[572] HIPSSA Sadc Model Law "Article 19: a person who "intentionally without lawful excuse or justification: (a) intentionally initiates the transmission of multiple electronic mail messages from or through such computer system; or (b) uses a protected computer system to relay or retransmit multiple electronic mail messages, with the intent to deceive or mislead users, or any electronic mail or Internet service provider, as to the origin of such messages, or (c) materially falsifies header information in multiple electronic mail messages and intentionally initiates the transmission of such messages, commits an offence punishable, on conviction, by imprisonment for a period not exceeding [period], or a fine not exceeding [amount], or both. (2) A country may restrict the criminalization with regard to the transmission of multiple electronic messages within customer or business relationships

damage arises from material that is transmitted and puts the host, or some person in bad light. There is also recognition of inuria,[573] which could arise as a result of defamation. Article 22 of the model, criminalises a person, who: 'initiates any electronic communication, with the intent to coerce, intimidate, harass, or cause substantial emotional distress to a person, using a computer system to support severe, repeated, and hostile behaviour, commits an offence punishable, on conviction… .'

The problematic issue that has always arises in defamatory actions is the issue of jurisdiction. If the defamatory remarks were put online by a defendant in New York, defaming a plaintiff in Zimbabwe, can a successful litigation be instituted? This question appears answered in an Australian precedent case *Dow Jones Inc. v Gutnick.*[574] However, there seem to be recognition of the need for courts to grant jurisdiction, in criminal cases, for offences committed in high seas affecting an individual inland. Given the globalised world, and the instantaneous nature of communication, and accessibility of information, courts could still extend its jurisdiction where there is found jurisdiction or impose liability which can only be redeemed through inter-state cooperation for enforcement purposes through adjustments at common law where either party abscond or refuses to abide by court orders. Article 23[575] of the Model Law addresses in part the jurisdictional issues, and extend liability to acts arising in ships, aircraft, or outside the jurisdiction of the courts. Disputes have also arisen in South African courts,[576] over jurisdiction,[577] and domicile effect of publication and or of plaintiff,[578] and area, deemed to be where the publication of the material would have occurred.[579]

Should a plaintiff require information for evidential purposes in an action for defamation, it appears the same principles apply as, in the Sadc Model Law, compelling production of the material under in civil proceedings an application for further particulars.[580]

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[573] *Brenner v Botha* 1956 (3) SA 257 (T).
[574] *Dow Jones Inc. v Gutnick* 194 ALR 433 ALJR 25*2)* HCA 56.
[575] HIPSSA Sadc Model Law; 'Article 23. This Act applies to an act done (offence committed) or an omission made: (a) in the territory of [enacting country]; or (b) on a ship or aircraft registered in [enacting country]; or (c) by a national of [enacting country] outside the jurisdiction of any country; or (d) by a national of [enacting country] outside the territory of[enacting country], if the person's conduct would also constitute an offence under a law of the country where the offence was committed.'
[576] *Casino Enterprises (Pty) Limited (Swaziland) v Gauteng Gambling Board and Others* 2010 (6) SA 38 (GNP).
[577] *Tsichlas v Touch Line Media (Pty) Ltd* 2004 2 SA 112 (W).
[578] *Burchell v Anglin* 2010 3 SA 48 (ECG) 121.
[579] A Roos & M Slabbert 'Defamation on Facebook: *Isparta v Richter* 2013 6 SA 529 (GP)' (2014) 17(6) *PER/PELJ*.
[580] Statutory Instrument I 120/95 and or Order 21 rule 137, High Court of Zimbabwe Rules, as Amended 1971.

While there are considerations that apply for the production of further particulars, [581] Sadc Model Law, seeks to compel through an order of the court for the production evidence and or material to be used as evidence in court. Article 20, compels ISP, to make disclosures and allow for an investigation into materials electronically stored in its database.[582] The validity of electronically obtained evidence is intact and admissible, which should support in equal measure the admissibility of evidence in defamation actions where evidence is electronically obtained, traceable and authenticated. Article 24 states that: 'In proceedings for an offence against a law of [enacting country], the fact that evidence has been generated from a computer system does not by itself prevent that evidence from being admissible.'

The liability of ISP under UNCITRAL e-commerce Model Law emerges again under the SADC Model Law. The same principle of functional equivalence is acknowledged, that conditions applying offline should be adaptable online. Article 35,[583] states that a hosting provider, 'is not criminally liable for the information stored at the request of a user of the service," provided that it promptly deletes any contentious material upon receiving instructions from the Court, or other competent lawful authorities exercising legitimate instructions with legal merit. Production of identities of users or subscribers can be made. For the purposes of defamation litigation, a plaintiff should be able to make a similar application upon good cause shown, to enable identification of potential defendants to institute litigation.

While criminal law, differs in procedural terms with civil law, there are instances where principles can be intertwined in pursuit of successful prosecution of matters before the courts, with distorting the thresholds of proof.

4.5. Conclusion

[581] *John Glendinning v Najmuddin Kader* (High Court) unreported case no HH 575-16 of 5 October 2016.

[582] HIPSSA SADC Model Law: It says: 'An Internet service provider who receives an order related to a criminal investigation that explicitly stipulates that confidentiality is to be maintained or such obligation is stated by law and intentionally without lawful excuse or justification or in excess of a lawful excuse or justification discloses: (a) the fact that an order has been made; or (b) anything done under the order; or (c) any data collected or recorded under the order; commits an offence punishable, on conviction, by imprisonment for a period not exceeding [period], or a fine not exceeding [amount], or both. Failure to permit assistance 21. (1) A person other than the suspect who intentionally fails without lawful excuse or justification or in excess of a lawful excuse or justification to permit or assist a person based on an order as specified by sections 25 to 27 commits an offence punishable, on conviction, by imprisonment.'

[583] SADC Model Law (note 2 above; Article 35).

This chapter has sought to provide the legal framework for best international practice, as espoused by the United Nations, and other regional organs. The three model laws provided, namely UNICTRAL, Budapest Convention and Sadc Model Law, encompass critical areas in cyberspace law, from which further analysis will be made in the forthcoming chapter under comparative analysis. There are number of considerations that could be made on the development of common law on cyberspace defamation. The principles of functional equivalence, neutrality, jurisdictional issues are all important elements that, if considered, could help craft a delineable legislative framework. However, the adaptability of the model laws will largely depend on the municipal laws available. For Zimbabwe, which this study is focused, the Model laws present a compelling need for their assimilation in the development of common law around cyber defamation. The models are important in promoting and further facilitating law reform. They provocatively in a stimulating way generate a range of issues around validity, enforceability and admissibility of principles around cyber space law.

The next chapter will seek to make a comparative analysis of three jurisdictions located in Europe, America and Southern Africa. This is an attempt at presenting a combined hybrid legislative framework adoptable and adaptable in Zimbabwe. United Kingdom has been chosen as one of the countries to have significantly influenced the development of common law in Zimbabwe, through South Africa;[584] United States has a strong constitutional free speech[585] guarantees[586] cast in stone and was the earliest country to develop the internet.[587] South Africa, is Zimbabwe's important economic neighbour from which Zimbabwe has borrowed significant precedents and authoritative texts[588] in the development of common law on defamation. Both Zimbabwe[589] and South Africa,[590] have had a strong English influence in their development of

[584] HR Hahlo & E Kahn *The South African Legal System and Its Background* (1968) 578.

[585] Constitution of the United States of America. The First Amendment (Amendment I) to the United States Constitution prevents the government from making laws which regulate an establishment of religion, prohibit the free exercise of religion, or abridge the freedom of speech, the freedom of the press, the right to peaceably assemble, or the right to petition the government for redress of grievances. It was adopted on December 15, 1791, as one of the ten amendments that constitute the Bill of Rights.

[586] *Texas v. Johnson* 491 U.S. 397 (1989).

[587] R Ronda 'The Internet: On its International Origins and Collaborative Vision A Work In-Progress' 1 May 2004 Available at *https://en.wikipedia.org/wiki/History_of_the_Internet*, (Accessed 23 April 2020).

[588] J Burchell *The law of defamation in South Africa* (1993) acknowledged by J Feltoe *A Guide to the Zimbabwean law of delict* (2018).

[589] *Moyse & Others v Mujuru* 1998 (2) ZLR 353 (S) referred to *Albu v Crawford* 1917 AD 102.

[590] *Albu v Crawford* 1917 AD 102.

common law on defamation. This explains why it is important to narrow the focus on the three jurisdictions in the next chapter.[591]

However, the model laws have only helped present best international practice. United Kingdom, USA, and South Africa, with similar and occasionally divergent legal approaches to the complexities of the digital era would equally help in developing a Zimbabwean common law that is certain, adaptable, coherent and rational.

[591] United Kingdom, United States and South Africa.

CHAPTER FIVE

COMPARATIVE ANALYSIS

5.1. INTRODUCTION

This chapter seeks to draw comparisons between three countries which are in three different continents. The chapter will focus on their statutory and common law approaches to addressing the legal problems associated with the rapid growth of the Internet into a worldwide web of computer networks. Statistics show that 4.66 billion people as of October 2020, representing about 60 per cent of the global population, are internet users, with mobile phones users accounting for over 90 per cent of users.[592] Scholars write that 'what complicates the problem still further is that in a legal sense the Internet does not really exist. It is not an identifiable body or corporation, nor is it administered in accordance with any internationally recognised conventions or constitutions'[593] as such different countries would implement varied approaches to the problems confronting them. Sanet opines that:

> 'Although the importance of legislative control has been discussed at length by lawyers, academies, philosophers and politicians ever since the inception of the Internet, there is little jurisprudence dealing with the Internet, as there have been few cases specifically involving its use. However, what is abundantly clear, is that some form of national and international regulation is necessary to prevent this global network's potential legal problems from getting out of hand.'[594]

This chapter will draw comparisons between United Kingdom (hereinafter 'UK'), United States (hereinafter 'US') and South Africa, which are important political and economic global players in the world that have through statutes and common law sought to the address the challenges shaped by the internet.

[592]Joseph Johnson 'Worldwide digital population' 10 September 2021. Available at https://www.statista.com/statistics/617136/digital-population-worldwide/, (Accessed 2 February 2021).
[593] S Nel 'Defamation on the Internet and other computer networks' (1997) *Comparative and International Law Journal of Southern Africa*, Vol.30, Issue 2. 154.
[594] Ibid.

The common problematic areas that have challenged the judiciary in the aforestated jurisdictions are mainly issues to do with statutory interventions over matters on the meaning and effect of publication, jurisdiction, and liability of Internet Service Providers (ISPs), as well as anonymous posters, and remedies for internet defamation. A conclusion will be provided after giving an outlook on how the different jurisdictions have intervened in the highlighted contentious internet areas. The premise of the discussion to follow is based on what was held in the *Dow Jones Inc. v Gutnick*, where Justice Kirby held that it was the responsibility of the legislature to reform the common law rules of defamation, and that there were limits to 'judicial innovation.'[595]

5.2. United Kingdom's Legislative Framework

The evolution of the law of defamation in the United Kingdom began 400 years ago, reflecting the battle of a balance between dignity, and freedoms of speech and press. As the UK began making recommendations for legal reforms in respect to defamation in the early 2000s, maintaining the equilibrium between the two foretasted forces, was subjected to pressures of technological transformations. The internet has evidently subjected different jurisdictions to the same problem. Hence, it is important for a country like Zimbabwe to learn from these developments. While precedents have guided the UK courts through the doctrine of *stare decisis*, legislative modifications have emerged over the years in part, informed by the internet. The United Kingdom is Zimbabwe's former colonial master. The proclamation by the British High Commissioner in 1891, that the law to be applicable in the then Southern Rhodesia (now Zimbabwe) shall be the law applicable at the Cape of Good hope as at 10 June 1891, guaranteed that the Roman-Dutch and English common law became an obligatory part of Zimbabwe's legal system.[596] From the 19th century to date, English common law has survived pre- and post-colonial successive governments. Its effect and relevance to Zimbabwe's legislative framework is still being felt to date. It is therefore important to consider the jurisdiction of the UK in the current research and identify areas from which Zimbabwe could adopt and adapt in dealing with cyberspace defamation.

[595] *Dow Jones Inc. v Gutnick* 194 ALR 433 ALJR 252*)* HCA 56.
[596] L Madhuku *An introduction to law in Zimbabwe* (2010).

There are similarities between the UK and US in their approach to the law of defamation which fall in the area of tort law. The defendant has to demonstrate that his reputation or self-esteem was lowered in the eyes of the recipients of the publication. The online defamation elements of wrongfulness, publication, and injury to reputation,[597] are determined by using an objective test of a reasonable person.[598] For publication to have occurred, the communication should be made to a third party, other than the plaintiff.[599] Given the complex issues arising out of online defamation, the UK had to make comprehensive statutory interventions. This research seeks to raise the problems associated with online defamation and recommend solutions thereof.

5.2.1. Statutory interventions

The most relevant legislation to this study is the Defamation Act, of 1996 and Defamation Act of 2013..[600] The Defamation Act of 1996 and 2013 makes an attempt at addressing legislative challenges arising as a result of the growth of the internet. Despite their enactment being an approach at redressing gapes in law, the English libel laws, have been adjudged by scholars to bring about 'substantial obstacles hindering the ability of the press to fulfil its responsibilities. When Parliament gave its first serious consideration in nearly a half-century to reforming the law of defamation, it failed to meaningfully address, much less remove, these obstacles. In this sense, the Defamation Act 1996 must be judged a failure. In an age of global communication, the consequences of this failure will be felt far beyond the shores of the United Kingdom.'[601] The Acts are discussed in brief below.

5.2.2. *The Defamation Act, 1996*

[597] D Stewart *Social Media and the Law* (2013) 148.

[598] *Jameel (Yousef) v Dow Jones & Co Inc* [2005] QB 946: Lord Phillips of Worth Matravers MR, in an online defamation case, delivering the leading judgment, observed (para 37) that 'English law has been well served by a principle under which liability turns on the objective question of whether the publication is one which tends to injure the claimant's reputation.'

[599] *Derbyshire County Council v Times Newspapers* (1993) 1 All ER 1011 HL.

[600] Defamation Act, 2013 Available at https://www.legislation.gov.uk/ukpga/2013/26/pdfs/ukpga_20130026_en.pdf, [Accessed 2 February 2013].

[601] D Vick & L Macpherson 'An Opportunity Lost: The United Kingdom's Failed Reform of Defamation Law' (1997) *Federal Communications Law Journal.* 49(3)

The Defamation Act 1996,[602] is the first major piece of defamation legislation since the Defamation Act 1952 in the UK. It made a serious attempt at addressing internet related challenges, making a wide scope of reforms, through modernising certain defences to defamation claims so that they address the complexities arising as a result of internet related developments.

The Act of 1996 also reduced the limitations period for defamation claims by a year, brought up modifications in procedure, designed to lessen technicalities in mounting defamation litigation and provide scope for settlements of disputes are issues considered trivia. While several provisions modify the law, the relevant consideration for the purposes of this study, is modification of defences to make them adaptive to challenges created by developments in cyberspace.

Importantly, the ISPs legislation, which is analogous to many jurisdictions, relates to the role of internet service providers, through the 'innocent dissemination' defence. The defence may be asserted by those who process or operate electronic communications equipment.[603] It is available to broadcasters of live radio or television programs, and an assumption can be made that it may even apply, when defamatory statements are made 'in circumstances in which [the broadcaster] has no effective control over the maker of the statement.'[604]

A comparable approach with how other jurisdictions have absolved liability of ISPs is important. The Defamation Act of 1996 extended this defence offered to ISPs to individuals, institutions, including universities that operate the computers. [605] However, the ISPs defence is not absolute, as they still have to prove that the ISP ' did not know, and had no reason to believe, that what it caused or contributed to the publication of a defamatory statement,' [606] and that 'it took reasonable care in relation to [the statement's] publication.'[607] This perhaps means

[602]Defamation Act, 1996 Available at *https://warwick.ac.uk/fac/soc/law/elj/jilt/1996_3/defamationact/*, (Accessed 2 February 2021).
[603] Defamation Act, 1996, section 1(3).
[604] Defamation Act, 1996 I(3)(d).
[605] When the Defamation Bill was introduced in the House of Lords, the Parliamentary Under-Secretary of State indicated that Internet service providers would be covered by section 1(3)(e). H.L. Deb. vol. 570 col. 605, 8 March 1996.
[606] Defamation Act, 1996, section l(1)(c).
[607]Ibid.

that in a lawsuit, the plaintiff might have to join the ISPs where there is concern about negligence and liability arising from their conduct in hosting the defamatory material.

The Act of 1996 was refined and amended by the Act of 2013, with a political desire to in part, reduce 'English libel laws from an international laughingstock to an international blueprint.'[608] Almost two decades later, the Act of 2013 was crafted to update defamation laws on the internet and bolster the defence for ISPs, providing guidelines on how to handle libel on the internet.

5.2.3. Defamation Act of 2013

Despite the Defamation Act of 1996 having addressed the challenges associated with the internet, there was need for further amendments, drawing lessons from new technological developments and need to plug the emerging holes. While the Defamation Act of 2013 was designed in part to deal with internet challenges, it was a response to, in part, perceptions that the law as it stood was giving rise to libel tourism. The UK's claimant friendly defamation laws attracted litigants to initiate litigation, like an American celebrity actor, producer and musician, Johnny Depp, who sued a The Sun, for defamation, in the United Kingdom, not his home country.[609] The Act of 2013, now required plaintiff to demonstrate actual or serious damages before litigating. It further introduced scope for internet service providers to allow for resolution of disputes between the complainant and the author of the author of the material concerned. It also introduced new statutory defences of truth, honest opinion, and publication on a matter of public interest or privileged publications. There are important lessons Zimbabwe can draw from the Defamation Act of 2013.

A significant change brought about by the Defamation Act of 2013 occurs in its first section. The Act provides that 'A statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant.'[610]

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[608] Patrick Wintour 'Laughing stock' libel laws to be reformed, says Nick Clegg' 6 January 2011. Available at *https://www.theguardian.com/law/2011/jan/06/libel-laws-nick-clegg?CMP=twt_gu,* (Accessed on 2 February, 2021).

[609] *Depp v News Group Newspapers Ltd* [2020] EWHC 2911 (QB).

[610] Defamation Act 2013 section 1(1).

The phenomenon of libel tourism was tightened by the introduction of the strict test for claims involving those with little connection to England and Wales.[611] This was achieved through the raising of the threshold of proof of damages to discourage wasteful use of the court's time.[612] It raises questions around to what extent can non-Zimbabweans, litigate in the country for defamatory statements published online, and the applicability of jurisdictional issues. This is important given how the internet has defied geographical boundaries, and Zimbabwe's generally claimant friendly defamation laws. There was also the introduction of protection for academic publications in academic journals.[613]

For defamation claims to run, section 1 of the Defamation Act, 2013 now requires 'serious harm' to the reputation of the victim. [614] Other considerations are, *inter alia*, serious financial loss, the nature and status of the parties, the magnitude of the publication, and the parties' financial position. While this approach would be applicable in circumstances where the litigant is seeking special damages, it might not be applicable as a test where the litigant is seeking general damages. Section 10 of the 2013 Act requires the plaintiff to focus attention on the principal author, editor or publisher of the defamatory statement, and only under exceptional circumstances would a secondary publisher be considered. This however presents challenges where the material is hosted by an ISP, and the author is anonymous. In any event, the courts have held that a litigant ordinarily chooses the defendants that he or she would want to cite in the action.[615]

The 2013 Act has outlawed multiple publication claims against various social media platforms. Section 8 outlaws separate cause of actions for the same defamatory statement. The Act now limits the defamation claims brought before courts in the UK by parties within the European Union and other foreigners to only exceptional considerations. The codification of defamation laws was an attempt at bringing clarity, certainty, and coherence in the adjudication of internet-based defamation claims. The Act seems to have eradicated huge swaths of common law defences to defamation. The problem that has arisen to litigants is when or not to rely on

[611]Defamation Act 2013 section 9 (2).
[612]Defamation Act 2013 Section 1.
[613]Defamation Act 2013, Section 6.
[614]Defamation Act, 2013: Serious harm (1)A statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant. (2) For the purposes of this section, harm to the reputation of a body that trades for profit is not "serious harm" unless it has caused or is likely to cause the body serious financial loss.
[615]*Zvobgo v Modus Publications* 1995 (2) ZLR 96 (H).

the common law and or statutory provisions given the grey areas that remain unaddressed. Collins writes that: 'For many years, the common law was vague and underdeveloped in relation to online defamation and Parliament responded by enacting the Defamation Act of 2013, which amongst other aspects sought to regulate defamatory statements on social media platforms.'[616] The technological advances and the accompanying internet's instantaneous publications, had tested the limits and efficacy of the prevailing traditional defamation common law principles.

5.2.4. Publications of Press Conferences and Public Gatherings

In the UK, the legislation protects journalists from reporting on statements made at public gatherings or meetings. [617] This would entail lawful public meetings and public press conferences, where fair and accurate extracts from official documents and press statements by public officials are reproduced in the public interest.[618] There is a significant shift from print to online journalism.[619] This protection would encompass publication of online material arising from public meetings and or press conferences. In Zimbabwe, there is no immediate protection for reporting on fair accurate proceedings of a public gathering and or press conference. Protection will lie on a Zimbabwean blogger domiciled in a foreign jurisdiction that specifically protects such publication. Zimbabwean litigants cannot initiate litigation to found jurisdiction over a story fairly and accurately capturing public events, at a public meeting or press conference in the UK where statutory protection is guaranteed. Journalists have been successfully sued for publication of press conference events, even if the story were a true reflection of what transpired at the event, as happened in *Zvobgo v Modus Publications*.[620] The defence, under the UK Defamation Act, 1996 protecting fair and accurate reporting would have sufficed. Scholars opine that a similar legislation in Zimbabwe is necessary, where legislative protection would be similarly afforded for fair, balanced and accurate reporting of such public

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[616] M Collins *Collins on Defamation* (2014) 12.

[617] The full list of protected situations is set out in Schedule 1 to the Defamation Act 1996.

[618] CHEDULE I OF DEFAMATION ACT, 1996 STATEMENTS HAVING QUALIFIED PRIVILEGE WITHOUT EXPLANATION OR CONTRADICTION

12(1)a fair and accurate report of proceedings at any public meeting held in a member state anywhere in the world**]**.

(2)in this paragraph a "public meeting" means a meeting bona fide and lawfully held for a lawful purpose and for the furtherance or discussion of a matter of public concern public interest, whether admission to the meeting is general or restricted.

[619]David Folkenflik 'Newspapers Wade Into an Online-Only Future' NPR 20 March 2009 Available at *http://www.npr.org/templates/story/story.php?storyId=102162128*, (Accessed on 10 February 2021).

[620] *Zvobgo v Modus Publications* (Pvt) Ltd 1995 (2) ZLR 96 (H).

meetings.[621] It is also important to note that the United States, which is being researched for comparative analysis, has a similar legislation that protects 'fair and accurate reporting' of public events. [622] In some states in the US, there are legal privileges protecting fair comments about public proceedings. In California you have a right to make 'a fair and true report in, or a communication to, a public journal, of a judicial, legislative, or other public official proceeding, or of anything said in the course thereof, or of a verified charge or complaint made by any person to a public official, upon which complaint a warrant has been issued.'[623] This provision was applied to circumstances where material was posted on an online message board[624] which would be applicable to social media sites, and not limited to blogs. It becomes imperative that given the broadened democratic space created by the internet, and the Zimbabwean constitution specifically section 61(2)[625] that promotes further media rights, there can be development of common law framework protecting fair and accurate reporting of public events and press conferences. The development of common law will safeguard the chilling consequences of exercise of press freedom experience in *Zvobgo v Modus Publications*, supra. It is important to analyse and draw comparisons with the United States because modern libel and slander laws, as implemented in the United States and South Africa are originally descended from English defamation law.[626]

5.2.5. Jurisdiction

Jurisdictional problems are at heart of internet regulation and have been relentlessly tested since the advent of the internet provoking a wide range of regulatory concerns.[627] Zimbabwean jurisdiction has not developed a precedent that tests jurisdictional issues surrounding publication of defamatory material online. It is important to understand how other jurisdictions applied traditional defamation principles to online defamation, so as to enable the development of jurisprudence and principles that will be applied should similar problems arise. Online

[621] G Feltoe *A Guide to Media Law in Zimbabwe* (2003) 34.
[622] First Amendment and Civil Code section 47, subdivision (d) permitted defendants to publish a "fair and true report" of the legal proceedings. See also *McClatchy Newspapers Inc. v. Superior Court* (1987) 189 Cal.App.3d 961, 975.)
[623] Electronic Frontier Foundation 'Online Defamation Law' Available at https://www.eff.org/issues/bloggers/legal/liability/defamation, [Accessed 10 February 2021].
[624] *Joanne colt .v Freedom Communications, Inc* California Court of Appeal, fourth district, div. 3 no. g029968.
[625] Section 61(2) which states that 'Every person is entitled to freedom of the media, which freedom includes protection of the confidentiality of journalists' sources of information.'
[626] English Defamation Law Available at https://en.wikipedia.org/wiki/English_defamation_law Accessed 10 February 2021
[627] J Goldsmith 'Unilateral Regulation of the Internet: A Modest Defence' (2000) 11 *EJIL* . 135-147.

defamation can be committed in different geographical areas because the place of downloading is ordinarily the place where online defamation occurs, and this may occur in different places. This is what in part complicates the court adjudication in circumstances where issues of jurisdiction arise where publication occurs in multi-jurisdiction publication. Menthe writes that common law has been significantly damaged by the digital era, and municipal and international law has been pushed to the limit. He writes that:

> 'In cyberspace, jurisdiction is the overriding conceptual problem for domestic and foreign jurisdictions alike. Unless it is conceived of as an international space, cyberspace takes all of the traditional principles of conflicts-of-law and reduces them to absurdity. Unlike traditional jurisdictional problems that might involve two, three, or more conflicting jurisdictions, the set of laws which could apply to a simple homespun webpage is all of them.'[628]

The major weakness emanating from the advent of the Internet is its total contempt for political and geographical borders, which has unwittingly and grudgingly turned the whole world into a single entity. Nel writes that: 'This has prompted the need to define the boundaries and liability of ISPs because the internet messages, through social media networks, may be unidentifiable, untraceable, outside the jurisdiction of the victim's courts or have insufficient funds to meet the claims, while an academic institution or other system operator may have more funds or insurance cover.'[629] The UK has enacted laws,[630] which permits service outside the country under certain conditions to voluntarily limit the jurisdiction of their courts both unilaterally and multilaterally. In the UK, for instance, the Civil Procedure Rules only permit service of a writ outside jurisdiction in certain circumstances.[631] However, it is important to consider the legal implications of UK's leaving the European Union after the leaving the latter block on 31 January 2021, on jurisdictional issues, in so far as they relate to Brexit.

5.2.5.1 Brexit

[628] D Menthe 'Jurisdiction in Cyberspace: A Theory of International Spaces' 4 *Mich. Telecomm. Tech. L. Rev* 69 (1998).
[629] S Net 'Defamation on the Internet and other computer networks' (1997) 30(2) *Comparative and International Law Journal of Southern Africa* 154.
[630] United Kingdom Rule 6.20, Civil Procedure Rules.
[631] Civil Procedure Rules 1998 Practice Direction 6B Available at https://www.justice.gov.uk/courts/procedure-rules/civil (Accessed 23 April, 2021).

Brexit,[632] is the formal withdrawal of the United Kingdom from the European Union. It has been part of the European Union for the past four decades, leaving the English law jurisprudence to develop and conform to in tandem with precedence of the European Court of Justice. Brexit, [633] will have profound jurisdictional issues. The persuasive decision of the Court of Justice of the European Union have regularly found their way into English jurisprudence. The positive effect of the CJEU is that its rules regarding jurisdiction and the enforcement of judgments provided a high degree of predictability, legal certainty in the union. Following Brexit, there will be a need for adjustments and amending legislation.

Under the Act, authorisation of by the English court will be a prerequisite before instituting legal proceedings on defendants in member states of the EU. Under the provisions of s 9 Defamation Act 2013, the English court will not have jurisdiction to hear a defamation case against a defendant residing outside its jurisdiction. It could only determine the merits of the case, unless it is convinced that having considered all other jurisdictions where the same material was published, the England and Wales is the most suitable jurisdiction to institute litigation in respect of the defamatory material or statement.[634]

5.2.5.2 Business Test

There are several considerations at play, should a litigant want to institute proceedings in the UK, against online defamatory remarks by defendants domiciled outside the borders. Traditional principles that have always applied before the advent of the internet could be considered. Precedents have been set, in determining jurisdiction in circumstances where the foreign company conducts business activities in the jurisdiction. In *South India Shipping v Bank of Korea*,[635] the defendant, a Korean bank, had a small branch located in the UK, which had no connection with a legal dispute that had arisen between its parent company, and South India Shipping, but was nevertheless served with an English writ. The court held that the bank

[632] Brexit was the withdrawal of the United Kingdom from the European Union and the European Atomic Energy Community at 23:00 31 January 2020 GMT. The UK is the only country to formally leave the EU, after 47 years of having been a member state of the EU and its predecessor, the European Communities, since 1 January 1973 Available at https://en.wikipedia.org/wiki/Brexit. (Accessed on 23 April 2021).

[633] United Kingdom will ceased to be a member state of the European Union on 29 March 2019, two years after giving notice pursuant to Art 50 of the Treaty on the Functioning of the European Union (TFEU). UK businesses and nationals will lose their EU law rights in all 28 member states; non-UK EU businesses and nationals will lose their EU law rights in the UK; and the UK will cease to have rights or obligations arising out of the EU.

[634] Section 9 Defamation Act 2013.

[635] *South India Shipping v Bank of Korea* [1985] 1 Lloyds Rep. 413.

had ‘established a place of business within Great Britain and it matters not that it does not conclude within the jurisdiction any banking transitions or have any banking dealings with the general public as opposed to other banks or financial institutions.’[636] The court held that as the branch had premises and staff and carried out work in relation to loans, it was considered a place of business within Britain and the service of writ was therefore valid, and jurisdiction established. The defendant bank, even though it was based in foreign lands, was deemed to be ‘present’ and have an ‘established place of business’ in England and that it mattered not that it does not conclude within the jurisdiction any public banking transactions. The South India Shipping Co. case demonstrate approaches to general jurisdiction similar to the U.S. doctrine of ’doing business’ type of jurisdiction. This precedent and approach is yet be applied in Zimbabwe. In an online defamation case, it would appear that where online international business transactions are partly conducted in Zimbabwe, with local clients establishing connections with a foreign entity, this could be used to found jurisdiction in Zimbabwe.

5.2.5.3 Section 9(2) Defamation Act 2013: Jurisdiction Guidance

In *Wright v Ver*[637] the English Court of Appeal sought guidance under section 9(2) of the Defamation Act, 2013 on the exercise of jurisdiction in circumstances where a defendant was domiciled outside of the UK jurisdiction. In most cases factors such as the ‘extent of publication’ and ‘damage to reputation’ will prove to be decisive considerations to exercise jurisdiction, though other relevant factors could be considered. The claim was brought by Mr. Wright, an Australian who had lived in the UK, against a businessman, Mr. Ver who was a citizen of Japan. The defamation suit related to publications that featured on YouTube and Tweeter. The claimant averred that the publications were defamatory in that they had claimed that he fraudulently misrepresented by stating that he was the first person to develop bitcoin.

The court’s jurisdiction was questioned on the basis that the litigant lived in a foreign jurisdiction, Japan, prompting the Court to address the issue on whether it had jurisdiction, under section 9(2) Defamation Act 2013. The Court of Appeal held that Section 9 required an individual to demonstrate why the England and Wales was the most appropriate forum to litigate. A number of factors considered, would be:

[636] Ibid (note 15 above).
[637] *Wright v Ver* [2020] EWCA Civ 672.

(a.) The best evidence available to show all the jurisdictions in which the statement is published;

(b.) The number of times that the statement has been published in each jurisdiction;

(c.) The amount of damage to a claimant's reputation in England and Wales compared with elsewhere; and

(d.) The availability of fair judicial process or remedies in alternative jurisdictions.

The decision of the court in *Wright v Ver*,[638] is important in giving an array of potential considerations in assuming jurisdiction for online material. Zimbabwean jurisprudence has not been developed over liability for publication of defamatory material online, which was authored in a different jurisdiction. The closest case to the exercise of online jurisdiction, is perhaps a criminal case in which a Zimbabwe court, sought to find criminal liability against journalist Andrew Meldrum, for 'publication of a falsehood' in an article published online by the Guardian.[639] The deportation of the journalist case ultimately went to the African Commission.[640] The Zimbabwe government argued that publication of any material that appears online, which has a bearing on the state, or events, happening within the jurisdiction of the state, it could exercise jurisdiction. The story had appeared on the website of a British publication, The Guardian, and it could be accessed all over the world. If the material was defamatory between private parties, considerations in *Wright v Ver* could apply, particularly whether the Zimbabwean state is the appropriate jurisdiction, best evidence available to show all the other jurisdictions, and amount of damage to the claimant's reputation. With the Meldrum case, there are concerns that "It is the possibility of global liability, in both criminal and defamation law, which now worries big media companies."[641] The Zimbabwe court had no hesitation about claiming jurisdiction in the Meldrum case.

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[638] Ibid.

[639] Journalist Andrew Meldrum published an article in the Daily News (an independent paper that has been closed by the Respondent State) on the internet version of the Mail and Guardian. As a result of the publication, the Complainants claim Mr Meldrum was charged with "publishing falsehood" under section 80 (1) (b) of the Access to Information and Protection of Privacy Act, (AIPPA). Mr Meldrum was found not guilty on 15 July 2002. Available at https://globalfreedomofexpression.columbia.edu/wp-content/uploads/2017/09/294-04-Zimbabwe-Lawyers-for-Human-Rights-and-Institute-for-Human-Rights-and....pdf Accessed 7 February, 2021.

[640] African Commission on Human and People's Rights, Case 294/04 *Zimbabwe Lawyers for Human Rights and Institute for Human Rights and Development in Africa (on behalf of Andrew Barclay Meldrum) / v Republic of Zimbabwe*.

[641] The Economist 'A jurisdictional tangle: Media companies around the world are alarmed by a high-court ruling in Australia' 10 December 2002. Available at *https://www.economist.com/node/1489053/print?Story_ID=1489053,* (Accessed on 7 February 2021).

The courts, in other instances, using the same approach under section 9 of the Defamation Act, would consider many factors to found jurisdiction. The case of *Berezovsky v Michaels*[642] related to publication of defamatory material on the Internet in multiple jurisdictions. Forbes magazine, the defendants, a US publication had about two thousand copies in circulation in England and just 13 copies in Russia. The defendants sought to stay the action, arguing that England was not the appropriate forum, which was denied on the grounds that:

> '[t]he present case is a relatively simple one … It is … a case in which all the constituent elements of the torts occurred in England. The distribution in England of the defamatory material was significant. And the plaintiffs have reputations in England to protect. In such cases it is not unfair that the foreign publisher should be sued here."[643]

The issues to do with the significance of the publication circulation, and reputational standards to protect, appear to be important considerations in founding jurisdiction for online publications. There however appear to be potential problems emerging. While it was easier for the plaintiffs to trace and sue the defendants in the *Berezovsky v Michaels* supra, other victims may find it grim to trace and find the anonymous authors of defamatory content. Even if the plaintiff finds the author, suing the defendants who are outside the jurisdiction of the courts without assets may be problematic. Where the plaintiffs trace, and find the authors, it may not make economic sense to sue if the defendants have no assets for execution to satisfy the court damages. The only available remedy, provided by jurisdictional challenge, could be the right of reply, to counterbalance any damage done.

5.2.7. Liability of Internet Service Providers

The liability of Internet Service Providers (ISPs), as intermediaries of communications has presented challenges to both lawmakers and the courts. The accountability of ISPs under English law depends to a great extent on whether it is regarded as an editor, publisher, printer, distributor, vendor, or a new type of disseminator of information.[644] Authors Landau and Goddard write that: 'If the courts were to decide that a service provider should be treated as an editor or publisher, it would have only the defence available to an author - in other words, its liability would depend on whether the alleged defamatory allegation was truthful, constituted

[642] *Berezovsky v Michaels* [2000] 2 All ER 986.
[643] Ibid (note 17 above).
[644] Ibid (note 19 above; 200).

fair comment or was privileged.'[645] They further correctly opine that service providers are probably most closely related to distributors or vendors. Practically, this has prompted ISPs to adopt a 'hands-off approach to policing their systems to ensure that they are viewed as distributors or innocent disseminators rather than publishers.'[646]

The Defamation Act, of 1996, drew a distinction between primary and secondary publishers on the basis of editorial control. Primary publishers of information who exercise direct routine editorial control would be held strictly liable, and secondary publishers, like distributors, would only escape liability if they prove that they were not aware of the published defamatory material.[647] This approach was adopted in *Dunning v Thomson*[648] where it was held that an ISPs should be able to avoid liability if it can be proved, that he had no knowledge of the defamatory allegation, no reason to believe the material was defamatory, and there was no negligence. Suggestions were made in the *Dunning* case that if defamatory material was brought to the attention of ISPs, there would be compelling need to examine the contentious material and take appropriate action, which may include deletion. This legal logic was followed in *Godfrey v Demon Internet Limited*,[649] where the plaintiff submitted that Demon Internet published the defamatory material by posting and hosting it, and that in accordance with section 1 of the Defamation Act 1996, the defendant's failure to delete the defamatory material removed its shield to liability under 'innocent dissemination.' However, in the US, ISPs are not liable and have no obligation to remove it. The liability of ISPs in the UK follows growing international jurisprudence that absolves liability if certain considerations have been met. This safe habour approach is line with South Africa's Legislative framework regarding liabilities for intermediaries. South Africa enacted a limitation clause in section 78(1) of Electronic Communications and Transactions Act,[650] and section 2 of Regulations of Interception of Communications Act.[651] These provisions limit the liability of ISPs for hosting defamatory material. The liability for ISPs in the UK were further enhanced by the drafting of the

[645] Ibid (note 19 above; 200).
[646] S Dooley 'Dealing with defamation on the Internet' (1996) *Solicitors Journal* 46.
[647] *Mudede v Ncube* and Others (High Court) unreported case no (*HH 143-2004*) [2004] ZWHHC 143 of 27 July 2004.
[648] *Dunning v Thomson* 881905 TH 313.
[649] *Godfrey v Demon Internet Limited* [2001] QB 20.
[650] The Electronic Communications and Transactions Act 25 of 2002
[651] The Regulation of Interception of Communications and Provision of Communication-Related Information Act. RICA was enacted on 30 December 2002 as one of the two pieces of legislation prohibiting the interception and monitoring of information. It came into force on 30 September 2005 and repealed the Monitoring Prohibition Act.

Defamation Act of 2013. Section 5 of the 2013 Act provides a new defence for ISPs for third party posts. This in essence insulates website operators from defamatory postings by identifiable posters. The ISPs have a responsibility to disclose authors of posted defamatory content to claimants to assist in drafting litigation for remedies.

At present in Zimbabwe, there is no legislation dealing with ISPs. A bill has been drafted, the Cyber Crime and Security Bill[652] which defines limitations of liability of ISPs. The problem with the Bill, whose operational framework is identical to the forestated South Africa's ECA Act, is its lack of clarity with respect to obligations to monitor activities and, whether ISPs could be prosecuted based on a violation of the obligation to monitor users' activities.[653] Media Watchdogs are concerned that: 'Without clear regulation, uncertainty created as to whether there is an obligation to monitor activities and, whether providers could be prosecuted based on a violation of the obligation to monitor users' activities.'[654] While the Bill is primarily focused on addressing crime, the same approach may be taken by litigants seeking information for defamatory content posted and hosted by ISPs. However, the Bill does explicitly state under what circumstances ISPs can be joined for liability.

It would be important for Zimbabwe to amend the current Bill and consider the relevance of additional safeguards provided under the Defamation Act, 2013 and ECA. The obligation, which is implied by Defamation Act of 2013 for ISPs to check every content hosted for defamatory material, is an unnecessary huge burden placed upon them, even if they are insulated. Questions arise that even if they checked every material, they will be never be in a position to determine the truthfulness or otherwise of content as they are not the original sources of the document. The statutory interventions[655] that protects websites and ISPs, guarantees sufficient safeguards against litigation if they didn't know the material was defamatory. This is important if there are facts or circumstances which would have led ISPs to believe that the material is defamatory, and acted quickly to remove them after notification.

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[652] Cyber security and data Protection Bill, 2019.

[653] Section 166 of the Cyber security and Data Protection Bill, Obligations and immunity of service providers (1) An electronic communications network or access service provider shall not be criminally liable for providing access or transmitting information through its system if such service provider has not— (a) initiated the transmission; or (b) selected the receiver of the transmission; or (c) selected or modified the information contained in the transmission.

[654] Media Institute of Southern Africa 'Computer crime and cybercrime bill a framework for Zimbabwe' Available at *https://crm.misa.org/upload/web/computer-crime-cyber-crimes-a-framework-for-zimbabwe.pdf*, [Accessed 7 February 2021].

[655] Regulation 19 of the 2002 Electronic Commerce (EC Directive).

5.2.8. Publication

In the UK, for publication to have occurred, the material has to be communicated to a third party, other than the plaintiff.[656] This approach is the same as in Zimbabwe.[657] Under English law, the essential element is the publication. If the defamatory material appears on the Internet, the presumption will be that other people other than the plaintiff have read it. The same assumption applies to information contained in print newspaper form, considered offline by the UNCITRAL Mode Law on E-commerce. Publication on the Internet occurs when the material is downloaded.[658] This applies to information contained in social media platforms.[659] Turner suggests that this includes, for example, acts such as 'tweeting' or 're-tweeting' a 'tweet' on Twitter, commenting on LinkedIn or a website,[660] uploading a video to YouTube, emailing defamatory material.[661] All these acts may all give rise to liability for publication. The sender of the communication will be liable in equal measure as the originator of the offending material.[662] Email communication, circulated in a group, with many recipients copied in, is actionable if it contains defamatory material.[663] Turner further suggests that while the particular communicative act is neoteric, departure from longstanding principles of defamation law in such instances is neither mandated nor necessary. This is important because common law remains the foundational bedrock for traditional defamation principles that have to be juxtaposed against online developments. They give guidance, where statutes cannot give an illuminating picture. The UK legislation has been adapting since the neoteric Internet advancement. The problem with Zimbabwe is absence of creative litigation, or such case to help develop common law around the internet defamation.

5.2.9. Single and Multiple Publication Rule

The multiple-publication rule was first developed in 1987 in the English decision of *Duke of Brunswick v Harmer*.[664] The Duke read a copy of a newspaper containing defamatory material

[656]C Gatley *Gatley on Libel and Slander* 12 ed (2013) 4.
[657] *Grindlays Bank v Louw* 1979 ZLR 189 (G).
[658] R Turner 'Internet Defamation Law and Publication by Omission: A Multi-jurisdictional Analysis' (2014) 37(1) *UNSW Law Journal* 34.
[659] J Landau and T Goddard 'Defamation and the Internet' (1995) 75 *International Media Law* .17
[660] *Jeffrey v Giles* [2013] VSC 268.
[661] *Higgins v Sinclair* [2011] NSWSC 163.
[662] Ibid (note 27 above; 76).
[663] D Calow 'Defamation on the Internet' (1995) *The Computer Law and Security Report.*
[664] *Duke of Brunswick v Harmer* (1849) 14 QB 185.

of him published almost two decades before. The court held that the 'limitation period of 6 years was reset when the Duke viewed the publication resulting in him not being out of time.'[665] The major chilling significance of the multiple publication rule is that the statute of limitations runs from the date of the last publication of the defamatory statement allowing an affected party to sue many years after the statement was first published. The case of *Duke of Brunswick and Luneberg v Harmer*[666] held that every publication that is defamatory to a third party gave rise to a new cause of action over the same facts and parties. The problematic effect of the digital era, where a million hits could occur in different geographical regions would trigger countless lawsuits in multiple jurisdictions placing a huge financial and crippling administrative burden on the publisher.

In *Godfrey v Demon Internet Limited*[667] the multiple publication rule was applied to the internet where the court held that:

> 'In my judgment the defendants, whenever they transmit and whenever there is transmitted from the storage of their news server a defamatory posting, publish that posting to any subscriber to their ISP who accesses the newsgroup containing that posting.'

There is a need for the law to adapt and grow in the digital era, given the speed of technology that has given new life to the threat defamation poses on the Internet, which was inevitable in the UK jurisdiction. The complexities around application of the multiple publication rule, meant that the legislature had to adapt, and codify the legislative framework to deal with the menace and havoc generated by the rule. Zimbabwe amended in the late 90s the Damages (Apportionment and Assessment) Act,[668] whose design was more structured to suit the traditional principles of defamation, than the advent of the internet. However, the Damages Act is fortuitously applicable to the digital era, and can help in the adjudication of cases, where considerations of multiple publication rule apply as it recognises single publication rule

[665] *Duke of Brunswick v Harmer* (1849) 14 QB 185.
[666] Ibid.
[667] *Godfrey v Demon Internet Limited* [2001] QB 201.
[668] Damages (Apportionment and Assessment) Act [Chapter 8:06].

through section 6.[669] Likewise, the Defamation Act, 2013[670] revived and rendered lawful and applicable the single publication rule. There appears to be a grey area in approach to the multiple publication rule. Under the rule, publishers or hosts of defamatory material would escape further liability under res judicata principle, regardless of whether the lawsuit was successful or not against them. Even if the plaintiff wins the case, chances remain that the offending material will persist in the online archives causing the same harm and distress, without an order for the removal of the offending material being possible. The Defamation Act of 2013 however allows fresh action to be bought against those who re-publish material online and imposes obligations on the media to retract defamatory statements published online.

Lawyers however argue that the single publication rule "to Internet libel remains a controversial area (and) most Courts in England and Wales adopt a stance which allows for the

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[669] Section 6 Joinder of all wrongdoers

(1) If a person who suffers damage which was caused by the fault of two or more wrongdoers, whether or not they were acting in concert, brings an action for damages against one or more, but not all, of the wrongdoers concerned—

(a) the claimant shall not be entitled thereafter to bring another action for damages in respect of the same cause of action against any other such wrongdoer who was not joined in the first action, without leave of the court granted upon good cause being shown.

[670] Section 8 Single publication rule;

(1) This section applies if a person—

(a)publishes a statement to the public ("the first publication"), and

(b) Subsequently publishes (whether or not to the public) that statement or a statement which is substantially the same.

(2) In subsection (1) "publication to the public" includes publication to a section of the public.

(3) For the purposes of section 4A of the Limitation Act 1980 (time limit for actions for defamation etc) any cause of action against the person for defamation in respect of the subsequent publication is to be treated as having accrued on the date of the first publication.

(4) This section does not apply in relation to the subsequent publication if the manner of that publication is materially different from the manner of the first publication.

(5) In determining whether the manner of a subsequent publication is materially different from the manner of the first publication, the matters to which the court may have regard include (amongst other matters)—

(a) the level of prominence that a statement is given;

(b) the extent of the subsequent publication.

(6) Where this section applies—

(a)it does not affect the court's discretion under section 32A of the Limitation Act 1980 (discretionary exclusion of time limit for actions for defamation etc), and

(B) the reference in subsection (1) (a) of that section to the operation of section 4A of that Act is a reference to the operation of section 4A together with this section.

Single Publication rule to be applied to the Internet, but the Defamation Act imposes certain obligations that ensure potential claimants are not unfairly disadvantaged when attempting to bring action against defamatory material."[671]

5.2.10. Remedies, Defences and Quantification of Damages

The Defamation Act of 1996 provides for defences which are available to defendants facing litigation. This limits the extent of common law intervention. Sections 2, 3, 4, 14, and 15 provides guidelines to mounting a defence for defamation. The codified defences are truth; honest opinion; publication on a matter of public interest and privilege (absolute or qualified). The damages awarded in the UK, as opposed to Zimbabwe and the South African jurisdiction are substantially higher.

The size and randomness of damages awards in the UK defamation cases has had a chilling effect on the exercise of free speech, in the jurisdiction which is largely considered claimant friendly. Scholars[672] are adamant that the Defamation Act of 2013, which was meant to address this chilling effect, however, it did little to reform remedies because the nominal cap on general damages has now risen to £300,000,[673] and the general damages are averaging around £10,000 and £20,000.

In the Zimbabwean jurisdiction defamation damages have not arisen beyond USD$10,000. This might have been done in consideration of the size of the economy, and the general principles the court normally applies that awards are never a road to riches, but an approach toward vindication of the claimant's name. Defamation claims in the UK are excessively higher. Many cases in the UK have started considering the defamatory impact of internet, in the adjudication of damages for online defamation.[674]

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[671] Saracens Solicitors 'What is the single publication rule and how does it affect internet libel' 29 December 2020 Available at *https://saracenssolicitors.co.uk/uncategorized/what-is-the-single-publication-rule-and-how-does-this-affect-internet-libel*, (Accessed on 26 April 2020).

[672] A David 'The Digital Defamation Damages Dilemma' (September 2 2019). Available at SSRN: *https://ssrn.com/abstract=3481760 or http://dx.doi.org/10.2139/ssrn.3481760*, (Accessed 8 February 2021).

[673] *Rai v Bholowasia* [2015] EWHC 382 (QB) [179]; Cairns (n 5) [25]; *Simmons v Castle* [2012] EWCA Civ 1288.

[674] *Cairns v Modi* [2012] EWCA Civ 138, [27].

The notable social media case, arising after the Defamation Act of 2013 is *Monroe v Hopkins*,[675] which arose after two tweets accusing the plaintiff of vandalizing a war memorial. The amounts considered appropriate in this case were £16,000 for the first tweet, and £8,000 for the second, making a total of £24,000. In *ReachLocal UK Ltd and another v Jamie Bennett and others*[676] the claimants sued for defamation arising from the publication of emails and blog posts claiming that they fraudulently and deceptively conned people and made profits from the deception. The damages amounting to £443,000 were awarded, representing the higher threshold.

In the *Depp II v News Group Newspaper Ltd* [677] case, the claimant unsuccessfully sought £325,000 in damages from the Sun newspaper after its online publication claimed that he was a wife beater. The plaintiff's team indicated that due to 'the seriousness of the allegations published' they were seeking 'a very substantial award.'[678] This case helps provide a damages framework which claimant can use, in pursuit of damages. The UK damages remedies scale is frowned upon in the Zimbabwean jurisdiction, which considers such high figures outlandish.[679] In a different jurisdiction, the United States, there is plaintiff who is seeking $50 million for defamation damages.[680]

In cases of defamation in Zimbabwe, issues of jurisdiction, remedies and damages might arise, and it will be interesting to see how a different jurisdiction approaches the matter. The US courts,[681] which shall be used for comparative analysis in the subsequent paragraph, no longer recognise, or enforce foreign judgments for libel in a jurisdiction which does not adequately guarantee protection for freedom of speech under the First Amendment.

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[675] *Monroe v Hopkins* [2017] EWHC 433 (QB).
[676] *ReachLocal UK Ltd and another v Jamie Bennett and others* [2014] EWHC 3405 (QB).
[677] *Depp II v News Group Newspaper Ltd* [2020] EWHC 2911 (QB).
[678] Bethany Minelle and Gemma PeplowJohnny Depp team's final speech: Amber Heard is a 'compulsive liar' and 'unreliable' 29 July 2020. *Sky News,* Available at *https://news.sky.com/story/johnny-depp-libel-trial-amber-heard-is-a-compulsive-liar-and-unreliable-witness-court-hears-12037975*, (Accessed 8 February 2021).
[679] *Mnangagwa v Alpha Media* Hldgs (Pvt*) Ltd & Another* 2013 (2) ZLR 116 (H).
[680] The Plaintiff is seeking a separate $50 million in a defamation case against his former wife, Amber Heard over an opinion piece she wrote in The Washington Post in December 2018.
[681] Virginia is one of just ten states that adhere to what is known as the *lex loci delicti* **rule**, which is Latin for place of the wrong where the tort was committed**.** That is defined as where the publication occurs. However, the Washington Post is not just printed in Virginia, it is also published on the internet. The newspaper's servers are also located in Virginia. Available at *https://www.robertreeveslaw.com/blog/johnny-depp-suing-virginia/* (Accessed on 8 February 2021)

Zimbabwe could adopt a more flexible approach to damages by considering the capacity of the defendants to meet the financial claim by adjusting the current figure of $10,000 upwards. Depending on the gravity of the defamatory statement, a figure of $50,000 should suffice if the financial capacity to vindicate the name of the claimant is possible. While it is appreciated that damages should not be 'a road to riches'[682] scholars observe that:

> 'Defamatory statements posted on social media platforms, in particular, are easily republished by others, leading to the possibility that allegations will spread 'virally'. Whether they go viral or not, it can be nearly impossible to remove the traces of defamatory comments from the internet, and the traces that remain are normally easily accessible to the public, and easily found in connection with the claimant's name. These features of internet defamation cases have been cited by the courts as potential justifications for increasing awards of general damages, in an attempt to ensure adequate vindication of claimants' reputations.[683]

A balance, however, could be struck if the capacity of the defendant is low. David observes that:

> 'Modern libel cases increasingly involve statements published not by traditional media organizations, but by ordinary individuals using the internet to air their grievances or express their views. Most of these defendants have more limited financial resources than media companies, and less awareness of the legal problems their online comments might cause, or of how to avoid or respond to those problems. But real harm can be caused to claimants' personal and professional reputations by online criticism, and it can be nearly impossible to remove the traces of defamatory comments from the internet, even if the victim sues successfully.'[684]

He further asserts that:

> 'Claimants should be adequately compensated for their losses as far as possible, but damages awards that risk bankrupting defendants for posting careless comments online cannot be appropriate. If this issue is not addressed, there is a risk that important online discourse will be seriously chilled.[685]

[682] *Mohadi* v *The Standard & Ors* 2013 (1) ZLR 31 (H)
[683] A David 'The Digital Defamation Damages Dilemma' (September 2, 2019). Available at *SSRN: https://ssrn.com/abstract=3481760* (Accessed 8 February 20210.
[684] Ibid.
[685] Ibid.

5.3. United States

The requirement for defamation in the US is that a false and defamatory statement about another should has been published (without privilege) to a third person by a publisher who was at least negligent.[686] However, the purpose of this research is located partly in the realm of the effect of the Internet on the adaptation and development of the US legislative framework. The Internet usage in the US represents about 90 percent of the population, with over 300 million people connected.[687] The US Supreme Court underlined the dangers posed by the Internet and held that it was a "unique medium – known to its users as 'cyberspace' located in no particular geographical location but available to anyone, anywhere in the world." [688]

There are significant departures in approach to the law of defamation, between UK and the US. British laws are perceived to be much more plaintiff friendly and less protective of speech when compared to American laws, which tend to lean more on the defendants.[689] The British defamation laws are believed to have a 'chilling effect' on free speech in the US. The American legal approach is premised on that the 'truth emerges from a clash of conflicting ideas, and no one voice possesses all wisdom or the truth.'[690] The first amendment protecting free speech is the first pillar of strength for defendants. A fruitful defamation lawsuit entails that a plaintiff demonstrates:

(1) a false and defamatory statement concerning the plaintiff;

(2) an unprivileged publication to a third party;

(3) fault amounting to at least negligence on the part of the publisher; and

(4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.[691]

Online defamation claims have witnessed litigants rushing to found jurisdiction in the UK, rather than the US, over stories that appeared on website, which is available and accessible in

[686] *Reno v ACLU* 117 S.Ct. 2329, 2334-35 (1997).
[687] Statistica 'United States: number of internet users 2000-2019' 7 January 2020 Available at *https://www.statista.com/statistics/276445/number-of-internet-users-in-the-united-states/*, [Accessed on 27 April 2020].
[688] Ibid (note 43 above).
[689] M Socha 'Double Standard: A Comparison of British and American Defamation Law' (2004) 23(2) *Penn State International Law Review Article 9 10-1-2004.*.
[690] Ibid (note 46 above; 475).
[691] Restatement (Second) of Torts 558 (1977).

every jurisdiction.[692] Socha opines that a solution must be found to solve the problem of British defamation law causing a chilling effect on speech in America. 'Such a solution would involve a balance between the free speech rights of Americans with the right of British citizens to protect themselves from defamatory statements. In a dispute between two nations that value basic freedoms, any solution should err on the side of protection of the freedom of speech, the most important fundamental right that any nation celebrates.'[693]

5.3.1. Constitutional and Statutory Intervention

The US has a statutory law regulating the law of defamation. Common law is available in the application of defences to the tort. Before the American Revolution in the 18th century, Sir William Blackstone published *Commentaries on the Laws of England* which were premised on English law precedent. The *Commentaries* became significant in the formation of the United States. The founding fathers were establishing a government, and the commentaries became a practical reference to written law. The system of law is partly being used to date. However, U.S. law has deviated significantly from its English progeny in substance and procedure.

The defendant's first point of defence to defamation is invoking the First Amendment constitutional provision, which ardently hold that: 'Congress shall make no law ... abridging the freedom of speech, or of the press.'[694] The test for free speech, is fortified by a constitutional provision which guarantees its effectiveness as its legal guiding torch as the first point of defence. However, the advent of the Internet has equally posed substantial challenges provoking the need for adaptation and law reform. The elements for online defamatory statement are publication, identification, defamation, fault, and injury. The defendant can however rely on a host of common law defences and or the first amendment in the constitution, which is highly discouraged in South Africa[695] as common law grounds are considered adequate in dealing with defamation law. A decision of *New York Times v Sullivan*,[696] held that a combination of statutory and constitutional elements are relevant in striking a balance free speech and another's reputation. In *Near v Minnesota*[697] and *New York Times v United*

[692] *Dow Jones, Inc. v Harrods, Ltd.*, 237 F. Supp.2d 394 (S.D.N.Y. 2002).
[693] M Socha (note 46 above; 490).
[694] The Constitution of the United States.
[695] *National Media Ltd v Bogoshi* (note 33 above).
[696] *New York Times v Sullivan* 1964 376 US 254 (USSC).
[697] *Near v Minnesota*, 283 U.S. 697 (1931).

States,[698] the Supreme Court ruled that the First Amendment protected against both prior restraint, pre-publication censorship.. The same approach against prior restraint is guaranteed at common law in Zimbabwe and is jealously guarded by courts.[699]

However, there is less protection for commercial speech than political speech under the First Amendment. The primate reason for this is that commercial speech advances a business profit element, as opposed to the free exercise of communication in the arena of promoting discourse and stimulating public debates in the public interest.[700]

5.3.2. Jurisdiction

Online defamation has provided lawyers with a practice called 'libel tourism'[701] where individuals because of the ubiquitous nature of the Internet, engage in forum shopping for appropriate jurisdictions to institute litigation, as demonstrated in *Dow Jones v Harrods*, supra. In *Dow Jones*, the plaintiff argued that under British law, the burden of proving truth of defamatory publication fell on the defendant, and that defamation is a strict liability tort and that the defendant needed not prove that defendant acted with any fault, in contrast with actual malice standard that applies under the First Amendment.

Importantly, the plaintiff, sought in the US court to declare that a British company may not sue for libel in Britain over a story that appeared on the Internet and is accessible anywhere in the world. This approach brought a new twist to jurisdiction over Internet jurisdiction-based lawsuits. The choice of jurisdiction is usually determined by what advantages the area provide for a successful litigation. There are several dilemmas provided by the complexities of jurisdiction on the Internet.

From the experiences highlighted in the *Dow Jones v Harrods*, supra, and the model laws, it might be prudent for countries to draft a treaty that applies to Internet cases and harmonisation of defamation laws of different jurisdictions.

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[698] *New York Times Co. v United States*, 403 U.S. 713 (1971).
[699] *Moyo v Muleya & Ors* 2001 (1) ZLR 251 (H).
[700] *Central Hudson Gas & Electric Corp v Public Service Commission* 447 U.S. 557 (1980).
[701] Defamation Act, 2013: Section 9 was introduced by UK Parliament to avoid 'libel tourism', the practice of foreign individuals or entities with little connection to the UK using its favourable defamation laws to bring claims against publications made in foreign jurisdictions.

5.3.3. The Australian Aapproach

Jurists noted in the *Gutnick* case that due to legal jurisdictional uncertainty created by the case, there were national and international measures that were needed.[702] In this regard, the Australian approach becomes ideal. The harmonisation of defamation law within Australia was painstaking, but became achievable and it could potentially set an achievable international approach and standard, even though it was intra-state.[703] Rolph states that 'it is no understatement' to suggest that the 'passage of uniform, national defamation laws' in Australia in 2006, was a momentous event in the history of Australian defamation law.[704]

This proposition could be set within the framework of the United Nations legal development research forums so as to initiate discussion and develop a common understanding on various issues that promote convergence and uniformity of legislation. Scholars have observed that this approach is ideal, within the area of defamation, and it becomes imperative with the extra-territorial effect of the digital era.[705] David writes that:

> 'Undoubtedly, convergence between countries' substantive and/or procedural rules for defamation would also be of great benefit in reducing costs faced by publishers. However, it is almost certain that the harmonisation of substantive defamation laws will not occur for some time, owing to the nature of the different value judgments that underpin the balance struck by various nations between freedom of speech and protection of reputation.'[706]

Prior to the beginning of 2006, Australia had eight different defamation jurisdictions. The differences between these defamation regimes were significant. Different state jurisdictions applied common law, codified legislation and in others it was combined. The substantive differences between these defamation laws may have encouraged "forum shopping" by plaintiffs and to differential outcomes in respect of the same publication when sued upon in a number of jurisdictions. The introduction of uniform, national defamation laws through the

[702] *Gutnick* (2002) 210 CLR 575. 120.
[703] D Rolph 'Uniform at Last? An Overview of Uniform, National Defamation Laws' 25 November 2008 76. Precedent, pp. 35-38, 2006, Sydney Law School Research Paper No. 08/141. Available at *SSRN: https://ssrn.com/abstract=1307421.*
[704] Ibid.
[705] A David 'The Digital Defamation Damages Dilemma' 2 September 2019). Available at *SSRN: https://ssrn.com/abstract=3481760* or *http://dx.doi.org/10.2139/ssrn.3481760,* (Accessed 8 February 2021).
[706] Ibid.

Uniform Defamation Legislation ('UDL')[707] created greater certainty by providing a single substantive law encompassing all different Australian states.

This approach might be applied at global level. It may take years to achieve substantive harmonisation of defamation laws, given clear divergence in procedural approaches, which will be difficult to reconcile.

However, it appears for now, the long arm of the US law is available to protect its citizens and guarantee them equal protection of the law. This makes it easier to facilitate service for online defamation, emanating from a different state, and or outside the USA. Several principles have been adopted to found jurisdiction. The minimum contact rule can apply and the Court can exercise jurisdiction to a person who has minimum level contact with the state or states within.[708] This would also require a close examination of the facts. The *Calder v Jones*[709] case, provided the effects test principle, to guide the courts in exercising jurisdiction. In the *Calder* case, the Supreme Court Justice Rehnquist held that the:

> 'Intentional, and allegedly tortious, actions were expressly aimed at California (a state). Petitioner South wrote and petitioner Calder edited an article that they knew would have a potentially devastating impact upon respondent. And they knew that the brunt of that injury would be felt by respondent in the State in which she lives and works and in which the National Enquirer has its largest circulation. Under the circumstances, petitioners must 'reasonably anticipate being hauled into court there' to answer for the truth of the statements made in their article.'[710]

Justice Rehnquist held that the effects of the defendant's conduct in another jurisdiction, Florida, brought substantial effects which gave rise to potential liability in California. This effect test approach, with respect, could be applied to online defamation proceedings. The effects case was also considered in the *Northwest Healthcare Alliance, Inc. v Healthgrades.com, Inc*[711] case. Northwest brought action alleging defamation after what it considered an unfavorable rating on Healthgrades' website. The issue arose, whether to exercise

[707]R Breit 'Uniform Defamation Law in Australia: Moving Towards a More 'Reasonable' Privilege.' (2011). *Media International Australia*(138), 9-20. Available at: http://ecommons.aku.edu/eastafrica_gsmc/5 (Accessed on 23 April 2021).
[708] *Calder v Jones* 465 U.S. 783 (1984).
[709] *Calder* (note 58 above).
[710] *Calder* (note 58 above) cited in *World-Wide Volkswagen Corp. v Woodson* 444 U.S. 286 (1980).
[711] No. 01-35648 (9th Cir. October 7, 2002).

jurisdiction over Healthgrades, which belonged to a different state. The Court applied the 'effects test' and held that Healthgrades had involved itself into the Washington state home health care market by introducing ratings of Washington medical service providers, hence the court for that reason, could exercise jurisdiction. The effects of Healthgrades' conduct were considered in Washington, and the Court found that the exercise of personal jurisdiction over the defendant in the state of Washington was constitutionally permissible.

The issue of jurisdiction can be problematic, as evidenced by the decision in *Stanley Young v New Haven Advocate*,[712] where the Court of Appeals held that it cannot exercise jurisdiction over persons residing outside the state of Virginia for posting material on the internet. In *Tsichlas v Touch Line Media (Pty) Ltd*,[713] both parties were domiciled in South Africa, but in different court jurisdictions, and the court adopted the Gutnick, supra, approach, which dictated that the court could found jurisdiction where the material was downloaded. However in *Stanley Young v New Haven Advocate*, supra, the Court found that a court in Virginia cannot exercise jurisdiction over the Connecticut-based newspaper defendants because 'they did not manifest an intent to aim their websites or the posted articles at a Virginia audience. Therefore, the Court reversed the order denying the motions to dismiss for lack of personal jurisdiction made by the defendants.'[714] The effect of downloading to exercise publication and jurisdiction, which was also followed in the *Gutnick* case, did not apply. In the US there is no uniformity in the application of internet-based defamation principles.

5.4.1. Publication

As discussed in paragraph 5.3, the elements of defamation in the US involve publication of defamatory material to a person other than the plaintiff. In order to prove a prima facie defamation case, the plaintiff would have to establish a false and defamatory statement by defendant concerning the plaintiff; an unprivileged publication to a third person, fault, amounting to at least negligence; and actual or presumed damages.[715] If the defamation involves a company and has a reputational effect that affects the plaintiff's business or profession, damages will be presumed. If the question of truth arises, a jury is allowed to

[712] *Young v New Haven Advocate* 315 F.3d 256 (4th Cir. *2002*).
[713] *Tsichlas v Touch Line Media (Pty) Ltd* 2004 (2) SA 112 (W).
[714] *Stanley Young v New Haven Advocate* 315 F.3d 256 (4th Cir. *2002*).
[715] *Chowdhry v NLV, Inc.* 109 Nev. 478, 483, 851 P.2d 459 (1993) (citing Restatement (Second) of Torts, § 558 (1977).

determine the "basis in truth," since it involves a determination based in the factual matrix of the case.[716]

5.4.2 Multiple and Single Publication Rule

In the US, the single publication rule ensures that litigation is initiated for only one action regardless of the number of multiple publications carrying the same material. The single publication rule has been consistently followed in the US. Courts have held that website libel should fall under a single publication rule because the Web is a form of mass publication.[717] The statutory intervention states that, 'Any one edition of a book or newspaper, or any one radio or television broadcast, exhibition of a motion picture or similar aggregate communication is a single publication.'[718] Therefore, publication of a defamatory material in a magazine with a large circulation would count as a single publication. The Uniform Single Publication Act states that: 'No person shall have more than one cause of action for damages for libel ... founded upon any single publication or exhibition or utterance, such as anyone edition of a newspaper or book or magazine or any one presentation to an audience or any one.'[719]

There is however a statute of limitations with regards of defamatory online publication. In *Firth v State of New York,*[720] a report was placed on the Internet and the plaintiff, did not file a claim for over a year. The Court held that the limitation period begins from the period when the information was first posted online. New guidelines that may not interrupt prescription were formulated, which may be used as a precedent in Zimbabwe's jurisdiction, should the principle of limitation apply. In *Firth v State of New York*, it was argued that each 'hit' received on the offending material's website and subsequent modifications, were immaterial to the lawsuit because 'many Web sites are in a constant state of change' But other states have embraced the multiple publication rule, like Montana,[721] which has explicitly rejected the single publication rule.

[716] *Nevada Ind. Broadcasting v Allen,* 99 Nev. 404, 413, 664 P.2d 337, 343 (1983).
[717] Restatement (Second) of Torts.18 Section 577A(3).
[718] Ibid (note 53 above).
[719] legislative enactment of the Uniform Single Publication Act (USPA).
[720] *Firth v State of New York* 98 *N.Y.*2d 365, 747 N.Y.S.2d69.
[721] *Lewis v Reader's Digest Association, Inc.,* 162 Mont 401,512 P2d 702, 705-06 (1973).

The court considered that the policies behind the single publication rule 'are even more cogent when considered in connection with the exponential growth of the instantaneous, worldwide ability to communicate through the Internet,'[722] and that the multiple publication alternative would give 'even greater potential for endless retriggering of the statute of limitations, multiplicity of suits and harassment of defendants.'[723] The other effect, will be a chilling effect on the free expression if multiple lawsuits could be allowed in different jurisdictions for the same publication appearing in the internet. Fear of potentially ruinous litigation costs, will limit affect the right to expression. However, uniformity in the application of the Single Publication rule in the Zimbabwean jurisdiction is guaranteed by the enactment of the Damages Apportionment Act, and further buttressed by the common law position.[724] The United States predicament in terms of not having a harmonious approach to defamation laws is not different from the situation that was prevailing in Australia prior to the enactment of the Uniform Defamation Legislation. Different states, as earlier discussed, applied different rules prompting the need for harmonisation of defamations laws to create uniformity and avoid legal inconsistencies in the application of legal rules. Perhaps, a countrywide discussion followed by the development of uniform legislation will harmonise the legal framework and create common binding acceptable rules to prevent forum shopping in the country. Zimbabwe is a unitary state, administratively governed from the center with a coherent legal system binding for all. This approach might not be necessary and enacted legislation is universally applied in all provinces.

5.4.3. Liability of Internet Service Providers

The extent of the fundamental similarity in approach between UK and the US over how to treat ISPs, was tested and shifted in 1960 by the US Supreme Court, which determined that English common law of defamation where publishers could be required to prove the truth of any defamatory allegation they publish, was an unjustified infringement of First Amendment. US defamation law shifted from what publishers 'could prove' to 'how they had behaved'. Section 230 of the Communications Decency Act of 1996,[725] was a US statutory intervention to aid ISPs against some vicious onslaught that threatened their existence in cyberspace, and established, guaranteed and provided a shield against liability.

[722] *Firth v State of New York* (note 69 above).
[723] Ibid (note 71 above).
[724] *Mashamhanda v Mpofu and others* 1999 (1) ZLR 1 (H).
[725] Congress specifically enacted 47 U.S.C. § 230 (1996) to reverse the *Prodigy* findings and to provide for private blocking and screening of offensive material. § 230(c) states 'that no provider or user of an interactive computer shall be treated as a publisher or speaker of any information provided by another information content provider.'

The pertinent precedent on the liability of ISPs, was the case of *Cubby Inc* & *Bloncbard v CompuServe and Fitzpatrick, supra.* CompuServe, a huge ISP, provided a platform for hosting different journalism content, and used a private company to scrutinise content for editorial safeguards. The online defamatory material attracted litigation, and the Court held that CompuServe could not be held liable because they held little editorial control over the content. The court held further that the defendant did not know, or did not have a reason to know of the existent of the defamatory material. The position of the defendant, in this case CompuServe, was comparable to a public library, bookstore or newsstand, as a mere distributor.

In general, the court agreed that ISPs should not be held responsible for the truth or falsity of the messages on their hosts. Similarly, Justice Stevens, held in in *Sony Corporation of America, Inc. v Universal City Studios, Inc.*, that:

> 'the sale of copying equipment ... does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes, or, indeed, is merely capable of substantial non-infringing uses.'[726]

The legal position now firmly held on behalf of ISPs, is that they provide a service that is widely used for "legitimate" and "unobjectionable purposes." The case of *Zera v America Online*,[727] insistently exonerated ISPs from any potential liability for hosting material that could be considered defamatory. In *Zera*, supra, a victim of a malicious hoax, sued America Online, an ISP, for hosting material that defamed him, and exposed him to numerous insults, as he was depicted as glorifying violence and racism. However, the courts held that internet computer service providers could not be sued for defamation posted by third parties. This effectively reversed the decision in the *Prodigy* case and established the fortification of ISPs against lawsuits for hosting defamatory material. The liability for ISPs is a grey area in the Zimbabwe jurisdiction. A comprehensive legal bill that seeks to absolve ISPs from liability has been gazetted and is yet to become law.[728] However, ISPs are insulated from liability in the same approach adopted in Zera v America Online.

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[726] *Sony Corporation of America Inc., et al. v Universal City Studios Inc. et al.* 464 U.S. 417 (1984).

[727] *Zera v America Online*, 129 F.3d 327 (4th Cir. 1997).

[728] Cyber Security and Data Protection Bill, 2019 Available at *https://altadvisory.africa/2020/05/20/zimbabwe-gazettes-cyber-security-and-data-protection-bill/*, [Accessed 9 February 2021].
On 15 May 2020, the Cyber Security and Data Protection Bill (the Bill) was published in the Zimbabwean Government Gazette. The Bill is intended to consolidate cyber-related offences and provide for data protection

In *Zvobgo v Kingstons*[729] it was stated that the liability of the distributor and publisher of published material is based on negligence and not intention.[730] It therefore means for now, before the passing of the Bill into law, the test for liability of ISPs is negligence. Besides, the Bill in its current form adequately protects the ISPs from liability for hosting content that gives rise to criminal liability and provides guidelines to be followed to avoid criminal liability. The Bill only provides scope for criminal proceedings and does not adequately provides for defamatory postings that give rise to civil proceedings. While the Bill is still to be enacted, there is scope for revision and inclusion of progressive of rules that conform to internationally acceptable standards. Scholars agree there is still scope for improvement, especially taking into considerations UK's Defamation Act of 2013 ISPs guidelines, and section 230 of the Communications Decency Act. Saki opines that: 'Zimbabwe has the benefit of not being the first country to come up with laws regulating the cyberspace, this also presents challenges and opportunities in attempting to incorporate lessons learnt from other jurisdictions.[731]

5.4.4. Defences Available

The first Amendment of the US Constitution, is an unequivocal protection of freedom of the press. Defamation law in the US is regarded as less plaintiff-friendly than the UK, due to the deliberate and occasional invoking of the First Amendment by defendants, as a first line of defence to defamation.

The US has a diverse approach to libel and slander laws, with codification of both forms of defamation, creating a myriad of rules that span across various states. Criminal defamation laws, which have been struck off legislative framework in Zimbabwe[732] with regional

and seeks to 'create a technology driven business environment and encourage technological development and the lawful use of technology.'

[729] *Zvobgo v Kingstons* 1986 (2) ZLR 310 (H).

[730] *Zvobgo v Kingstons Ltd* 1986 (2) ZLR 310 (H).

[731] O Saki 'Omnibus Cyber Laws for Zimbabwe' 22 January 2018. Available at *https://crm.misa.org/upload/web/misa-zimbabwe-commentaries-on-the-cybercrime-and-cyber-security-bill-2017_december-2018.pdf,* [Accessed on 9 February 2021].

[732] *Madanhire & Another v The Attorney General* 2014 (1) ZLR 719 (CC). The court held: 'It is inconceivable that a newspaper could perform its investigative and informative functions without defaming one person or another. The overhanging effect of the offence of criminal defamation is to stifle and silence the free flow of information in the public domain. This, in turn, may result in the citizenry remaining uninformed about matters of public significance and the unquestioned and unchecked continuation of unconscionable malpractices.'

organisations advocating the same,[733] are still available in different US states.[734] Some states have criminal libel laws on the books, even though they haven't been used.[735] Once a defamatory statement arises, a litigant can file for crimen injuria. However, common law defences available are privilege for parliament and court related statements, and fair comment.[736] Truth is a guaranteed absolute defence against defamation, and once it is established, the liability of defendants fall away.[737]

5.5. South Africa

The purpose of this research is based on how internet based defamation publication could be regulated in Zimbabwe. Statistics show that in South Africa, as of 2019, 31.18 million people were active internet users, with 28.99 million active mobile internet users. The country has a 54 percent internet penetration, with the population spending an average of 8 hours and 32 minutes on the internet per day via any device.[738]

South Africa's law of defamation, which is based on the *actio iniuriarim*, originated from Roman law, and protects a person whose 'personality rights' has been infringed.[739] There is liability which arises jointly and severally if it involves several people. Zimbabwe has extensively borrowed and infused into its jurisprudence South African precedents and authoritative texts defining its defamation cases. South Africa's key elements to defamation applies to those provided in chapter 2, involving wrongful, intentional and publication of a defamatory statement concerning the plaintiff, as provided in *Khumalo v Holomisa*.[740] The plaintiff has to establish and prove the elements. Loubster writes that once a plaintiff establishes that a defendant has 'published a defamatory statement concerning the plaintiff, it is presumed that the publication was both wrongful and intentional. A defendant wishing to avoid liability

[733]The African Commission: 'Resolution 169 on Repealing Criminal Defamation Laws in Africa' 48th Ordinary Session (2010) called on all states to 'repeal criminal defamation laws or insult laws which impede freedom of speech, and to adhere to the provisions of freedom of expression, articulated in the African Charter, the Declaration, and other regional and international instruments'

[734] Florida (Florida Statutes, §§ 836.01-836.11); North Carolina (North Carolina General Statutes, § 14-47)

[735] New Hampshire (New Hampshire Revised Statutes Annotated, § 644:11)

[736]*Gertz v Robert Welch, Inc.*, 418 U.S. 323 (1974), the Supreme Court suggested that a plaintiff could not win a defamation suit when the statements in question were expressions of opinion rather than fact. In the words of the court, "under the First Amendment, there is no such thing as a false idea"

[737] *New York Times Co. v Sullivan* 376 U.S. 254 (1964), see *Time Inc. v Hill* 385 U.S. 411 (1967).

[738] Statista 'Where is South Africa digitally in 2019: the stats' 1 April 2020 Aavailable at *https://flickerleap.com/south-africa-digitally- 2019-stats/* (Accessed 29 April 2020).

[739] J Burchell *The Law of Defamation in South Africa* (1985) 34.

[740] *Borgin v De Villiers* 1980 3 SA 556 (A), see *Khumalo v Holomisa* 2002 5 SA 401 (CC) 18.

for defamation must then raise a defence which rebuts either wrongfulness or intention.'[741] It appears courts are slowly warning up to the internet era, adjusting to common law by making considerations of a reasonable 'social media user' as the objective test,[742] which is used to determine liability arising out of the publication.[743]

However, there are apprehensions that South Africa is 'lagging behind other countries in formulating a clear legislative framework to deal with online defamation cases'[744] and concerns abound that: 'Litigation involving social media is still very new in South Africa and only a few reported cases can be found.'[745]

5.5.1 Statutory and Constitutional Interventions

The South African Constitution[746] maintains a balancing act between freedom of expression and the reputational considerations of others. However, unlike in the US, where defendants can invoke a constitutional defence under the First Amendment,[747] South Africa does not entertain defences that summon constitutional considerations because there are sufficient remedies available under common law to insulate defendants against defamation claims. In *National Media Ltd and Others v Bogoshi,*[748] the defendants sought to argue that the publication of the offending article was lawful and protected under the Bill of Rights in the Constitution.[749] The defence was considered bad in law.

There is some reluctance to interfere with common law in the adjudication of defamation claims. The little statutory effort South Africa has made towards adjusting to the internet technological advancements was crafting the Electronic Communications and Transactions Act (ECTA) of 2002 which under Section 78,[750] shields ISPs from liability. In

[741] M Loubser and R Midgely *Law of Delict* (2012) 340.
[742] *Manuel v Economic Freedom Fighters and Others* 2019 (5) SA 210 (GJ**)**, where the courts applied in objective test 'a consideration of the ordinary social media user.'
[743] A Roos & M Slabbert `Defamation on Facebook: *Isparta v Richter* 2013 6 SA 529 (GP)' (2014) 17(6) *PER/PELJ* 2852.
[744] Iyer D 'An Analytical Look Into the Concept of Online in South Africa' (2018) 32(2) *Speculum juris*.
[745] A Roos and M Slabbert (note 88 above).
[746] Section 16 of the South African Constitution of 1996,.Section 16.
[747] *New York Times* Co. *v Sullivan* 376 U.S. 254 (1964).
[748] *National Media Ltd v Bogoshi* 1998 (4) SA 1196 (SCA).
[749] Constitution of the Republic of South Africa, 1996.
[750] No general obligation to monitor: Section 78. (1) When providing the services contemplated in this Chapter there is no general obligation on a service provider to- (a) monitor the data which it transmits or stores; or (b) actively seek facts or circumstances indicating an unlawful activity. (2) The Minister may, subject to section 14

terms of section 78, there is no general obligation on ISPs to monitor content it is hosting on its servers. However, the Cybercrimes and Cyber Security Bill,[751] makes no reference to online defamation, but criminalises distribution or broadcasting of data messages that are harmful to others. The law of defamation is firmly anchored on common law and any litigant should find a remedy and or defence under the available common law defences, and the plaintiff should satisfactorily prove all the elements therein to sustain the claim.

5.5.2. Publication

The features accounting for what is deemed publication are available under Chapter 2 of this research. Publication would be established once the defamatory statement is made known to at least another person,[752] and it can occur in various forms such as speech,[753] print and online forums like social media websites,[754] newsgroups and bulletin boards. The interpretation of online publication was concisely put in *Tsichlas v Touch Line Media (Pty) Ltd,* where the court held that:

> 'In effect…whenever anybody, anywhere in the world, accesses this website and reads and understands the words which are complained of in this matter, there will have been publication to that user at the particular place where the user has accessed the website. Bearing In mind that we are dealing with the Internet and electronic communications, that national or geographic boundaries would not apply and distances are irrelevant, the implications of this conclusion are enormous.'[755]

It is suggested that anyone who 'likes' or 'shares' a defamatory posting can also be held liable for the defamation, since she or he confirms and repeats the posting.[756] The same traditional common law principles around republication apply. The functional equivalence approach

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of the Constitution, prescribe procedures (a) inform the competent public authorities of alleged illegal activities under- (b) to communicate to the competent authorities, at their request, information for service-providers to taken or information provided by recipients of their service; and enabling the identification of recipients of their service.

[751] As introduced in the National Assembly (proposed section 75); Summary of Bill published in Government Gazette No. 40487 of 9 December 2016.

[752] V*ide Rivett Carnac v Wiggin* 1997 (3) SA 800 (C) at 88.

[753] J Burchell *The Law of Defamation in South Africa (1985)* 35.

[754] *Hechter v Benade Unreported* case no [2016] ZAGPPHC 1018 of 5 December 2016.

[755] *Tsichlas v Touch Line Media (Pty) Ltd* 2004(2) SA 112 (W) 120.

[756] *Isparta v Richter* 2013 6 SA 529 (GNP) 35 see also B Dewar *Kelsey Stuart's Newspaperman's Guide to the Law* 5 ed (1990) 43, '[a] person who repeats or adopts and re-publishes a defamatory statement will be held to have published the statement. The writer of a letter published in a newspaper is *prima facie* liable for the publication of it but so are the editor, printer, publisher and proprietor. So too a person who publishes a defamatory rumour cannot escape liability on the ground that he passed it on only as a rumour, without endorsing it.'

envisaged under the UNCITRAL Model Law, could find relevance in this scenario. Under functional equivalence, the traditional principles applied before the advent of the internet are applicable if the facts and circumstances are the same, and permissive of the adoption and application of the same to internet developments. Retweeting and or reposting is as good as republication of defamatory material from which liability can arise.

However, publication has its own further considerations. Scholars opine that if it's taken to mean that publication occurs upon the third party knowing the publication, then this approach is subject to other contemplations if, the publication had an 'encoded message, or the plaintiff is unaware of the meaning, courts would not regard that as publication, until the meaning dawned on the plaintiff.'[757] If a plaintiff is not directly referred to in a defamatory statement, the plaintiff must indicate the facts and circumstances which would have identified him or her identified in the publication.[758] The same traditional principles apply, where the identity of the plaintiff is not clearly discernible, as to be excipiable, the plaintiff would have to provide the facts and circumstances that illuminate the reference to him or her.[759]

The same approach was taken in *Knupffer v London Express Newspapers Ltd*,[760] where the court held that: 'There are two questions involved in the attempt to identify the appellant as the person defamed. The first question is a question of law - can the article, having regard to its language be regarded as capable of referring to the appellant? The second question is a question of fact, namely, does the article in fact lead reasonable people, who know the appellant, to the conclusion that it does refer to him? Unless the first question can be answered in favour of the appellant, the second question does not arise.'

There are instances where the presumption of publication is presumed, on the publication of material appearing in a book, postcard even telegram. Neethling opines that the reason of the existence of a presumption of publication in book and postcard cases is that it can be expected and therefore probable, that others will read the words.[761] When the same principles are applied to the Internet, it becomes clear that publication of a defamatory

[757] S Nel 'Defamation on the Internet and other computer networks' (1997) *Comparative and International Law Journal of Southern Africa*. 154-174.
[758] *Isparta v Richter* 2013 6 SA 529 (GNP) 24.
[759] *Knupffer v London Express Newspapers Ltd* 1944 All ER 495 (HL) 497.
[760] Ibid (note 101 above; 497).
[761] J Neethling *et al Law of Delict* (2010.

allegation will occur as soon as users of the Internet download the particular defamatory message. Particular presumption of publication must also exist where a defamatory message has been sent to an Internet bulletin board discussion forum since it can be expected, and is highly probable, that others will also read the message. On the internet, liability likewise will apply to a person who originates the publication, republishes the statement,[762] and any person who repeats the remarks.[763]

The first social media case to deal with Facebook defamatory material was the case of *Isparta v Richter*.[764] The emerging elements of 'tagging' and application of the objective test over Facebook comments emerged, and appropriate damages over comments made on the platform were granted. If an individual is tagged, he or she assumes liability over the comments associated with the tag.[765] This form of liability will escape some people, given the complex nature of the Internet, where an individual can unwittingly host unsolicited material after being tagged. It is submitted that given the complex nature of the internet, there is need for curriculum development that educates and informs students, from primary and secondary education under the Zimbabwe's General Certificate of Education system, about responsible communication on social media to avoid the pitfalls of causing pain, anguish, anxiety caused by the reckless publication of defamatory material online.[766] It would appear, the degree of recklessness that manifests in defamatory content online is a direct result of lack of knowledge of the social and legal implications thereof, as the case of *Le Roux v Dey* would suggest.[767] Technology and the internet are fairly new, hence the need for proper education and curriculum development.

In determining liability, courts would continue to use the objective test in online defamation cases. The court in *Heroldt v Wills,*[768] providing a more appropriate test for determining whether the statement was defamatory or not, held that: 'determining whether the

[762] See *Zvobgo v Modus Publications (Pvt) Ltd* 1995 (2) ZLR 96 (H).
[763] *Hassen v Post Newspapers* (*Pty*) *Ltd 1965* (*3*) *SA 562* (*W*).
[764] *Isparta v Richter* 2013 6 SA 529 (GP).
[765] A Roos and M Slabbert (note 88 above).
[766] *Le Roux and Others v Dey* 2011 (3) SA 274 (CC). This case highlights the dangers of lack of knowledge in handling social media by children. The Dey case arose from the publication by the applicants, then schoolchildren, of a computer-created image in which the face of Dr Dey, then a deputy principal of the school, was super-imposed alongside that of the school principal on an image of two naked men sitting in a sexually suggestive posture. Further details were occluded by the super-imposition of the school crest over the genital areas of the two men. The Supreme Court of Appeal affirmed the judgment of the North Gauteng Division of the High Court, Pretoria (High Court) that the publication of this image defamed Dr Dey, and confirmed the award of R45 000 in damages to him.
[767] Ibid.
[768] 2013 (2) SA 530 (GSJ).

words in respect of which there is a complaint have been defamatory, and whether a reasonable person of ordinary intelligence might reasonably understand the words concerned to convey a meaning defamatory of the litigant concerned.'

5.5.3. Jurisdiction

Publication of a defamatory allegation on the Internet, as demonstrated in the two different jurisdictions above, can raise jurisdictional challenges. A number of issues that may relate to the competency of the court to deal with the matter to found jurisdiction, and different jurisdictional statutory considerations could apply.

In terms of South African law, jurisdictional considerations are attached to where the cause of action arose, or the defendant's jurisdictional court.[769] If the defendant resides in a different jurisdiction, the plaintiff will have to litigate in that jurisdiction, or have him consent to submit to the jurisdiction of South Africa, since arresting to confirm or found jurisdiction was held unconstitutional in the *Bid Industrial Holdings* case.[770] The problematic challenge of online defamation is that geographical locations are varied and beyond the country's borders for enforcement purposes. Defamation is posted online at the click of a button globally. The South African plaintiff will have to identify the appropriate place where the publication occurred, identify the defendants, and prove the defamation elements. The problems that normally arise when defendants are residing outside the jurisdiction of the court, is associated with the 'time, expertise and resources to pursue such inter-jurisdictional online defamation cases.'[771]

Jurisdictional glitches normally emerge when effecting service to initiate litigation. While proof of service effected by a messenger of court or Sheriff is guided by both common law and

[769] Section 28(1)(d) of the Magistrates Court Act provides a court will have jurisdiction in respect of a*ny person, whether or not he resides, carries on business or is employed within the district, if* ***the*** cause of action arose wholly within the district**.**

[770] *Bid Industrial Holdings (Pty) Ltd v Strang and another* [2007] SCA 144 (SCA) Court held that under South African law, when a person not domiciled in South Africa is sued in a South African court, the court's jurisdiction had to be confirmed either by attachment of property or arrest of the person, unless the foreign defendant submitted to the jurisdiction of the court. The part of this rule permitting the arrest of a person has now been found to infringe the rights to freedom and security of the person, equality, human dignity, freedom of movement, and possibly also the right to a fair civil trial.

[771] Iyer D 'An Analytical Look Into the Concept of Online Defamation in South Africa' (2018) 32(2) *Speculum juris.*

High Court Rules, the digital era offers proof of service through online. This appears to be positive adaptation to the digital age by the judiciary.

In *CMC Woodworking Machinery (Pty) Ltd v Pieter Odendaal Kitchens,*[772] the court held that the applicant could use Facebook to serve a court notice on the defendant in circumstances in which the defendant's attorneys withdrew and the defendant consistently tried to evade service. It is however not clear, if the same could be done to a defendant residing in a different geographical location. The developmental of common law, is the recognition of shifting demands of the digital era which cannot be ignored by the trying demands of the times. Roos and Slabbert, succinctly put it thus: 'the court was wary of the law losing credibility if it failed to take into account the changing realities.'[773]

There is a licence, provided by the Constitution to the judiciary, that courts have a duty to develop the law in accordance with the principles of the Constitution.[774] It has been observed in *Heroldt v Willis*[775] that the:

> 'pace of the march of technological progress has quickened to the extent that the socia lchanges that result therefrom require high levels of skill not only from the courts, whi ch must respond appropriately,
> but also from the lawyers who prepare cases such as this for adjudication.'[776]

5.5.4. Anonymity

Anonymous postings on the internet raise difficulties in helping identify potential defendants who are authors of defamatory material to help facilitate litigation. Originators of the postings are in some instances difficult to establish, leading to lawsuits getting directed towards identifiable persons who reposted or republished. On some social media platforms, people tend to hide their identities when posting contentious and defamatory material. In *Rath v Rees,*[777] it was suggested that making use of common-law discovery proceedings against the ISPs may be an option that help discover the identity of the anonymous sender/s.

[772]*CMC Woodworking Machinery (Pty) Ltd v Pieter Odendaal Kitchens* 2012 (5) SA 604 (KZD).
[773]Roos & Slabbert (note 88 above).
[774]The Constitution of the Republic of South Africa, 1996 Ss 39(2) and section 173.
[775]*Heroldt v Wills* [2014] JOL 31479 (GSJ).
[776]Ibid.
[777] *Rath v Rees* 2007 (1) SA 99 (C).

In Zimbabwe, ISPs are legally obliged to record the names and details of their clients who have web sites hosted.[778] If any defamatory publication is posted, it will be easy to verify the identity of the individual for the purposes of instituting litigation. However, jurisdictional issues arise, where the anonymity of the person is based in a different jurisdiction, and the content appears on social media sites, such as Facebook, Tweeter, YouTube, Instagram, Pinterest and TikTok. South Africa can find itself in the same predicament as Zimbabwe, when such a situation arises.

The Zimbabwe government sought to unmask the identity of Baba Jukwa,[779] who posted highly offensive and defamatory content implicating government officials in nefarious activities ranging from assassinations, deceit, outright theft and corruption.[780] The anonymity of Baba Jukwa remained esoteric and hidden in hard drive servers away from the state's prying eyes, despite the state's investigative engagements with social media networks, including Google to unmask Baba Jukwa.[781]

5.5.5. Remedies: Defences Available

The available defences and elements accompanying them to the law of defamation are the same as provided in Chapter 3 of the research. However, the most common three defences in South African law to an alleged defamatory statement, **are** truth for the public benefit,**[782]** fair comment**,[783]** and if the statement is made on a privileged occasion**.**[784]

However, the defence of 'reasonable publication' emanating from *National Media v Bogoshi*,[785] case is yet to be applied to the Zimbabwe jurisdiction. If the statement is untrue, but defamatory, the emerging jurisprudence is that the defendant does not automatically become liable. The courts would consider the stages the author of the articles took to validate

[778] G Feltoe *Guide To The Zimbabwean Law Of Delict* (2018).
[779] Wikipedia 'Baba Jukwa', available at *https://en.wikipedia.org/wiki/Baba_Jukwa*, (Accessed on 8 February 2021).
[780] Jane Flanagan 'Online leaker exposes Mugabe's secrets' Sunday Morning Herald 15 July 2013. Available at *https://www.smh.com.au/world/online-leaker-exposes-mugabes-secrets-20130715-2pyxt.html*, (Accessed on 8 February 2021).
[781]Tendai Rupapa 'Baba Jukwa investigators in US' The Chronicle 2 September 2014. Available at https://www.chronicle.co.zw/baba-jukwa-investigators-in-us/, (Accessed 8 February 2021).
[782]*Media 24 Limited v Du Plessis* unreported case no (127/2016) [2017] ZASCA 33 of 29 March 2017.
[783]*The Citizen v McBride* 2011 4 SA 191 (CC).
[784] *Borgin v De Villiers & Anor* 1980 (3) *SA* 556 (A) at 577D-G.
[785] *National Media Ltd. and Others v Bogoshi* 1998 (4) SA 1196 (SCA).

the authenticity of the material, prior to publication. Public interest consideration is also key. The South African Supreme Court of Appeal crafted the defence of reasonableness, after strict liability was held incompatible with the constitutional protection of the right to freedom of expression. However, the nature, extent and tone of the article, and credibility of the source, will be considered. The opportunity given to the person concerned to respond, and the need to establish the truth before publication, is another important element.

Given the impulsive reactions to social media platforms, where speed is key, this defence may not be readily available to online newspaper defendants, and political activists who do not exercise caution before publication. De Vos, opined that: 'There is something about internet websites and social media platforms like Facebook and Twitter that seem to bring out the worst in people. Otherwise reasonably decent people who might well carefully weigh their words … can become raving hatemongers and irresponsible tattletales on these platforms.' [786]

Another defence available to a plaintiff who suffers financial loss as a result of the defamatory statement, can claim these damages using the Aquilian action.[787] A remedy of an interdict, provided in *Moyo v Muleya*,[788] is available to the plaintiff though it is granted under exceptional considerations. An interdict is granted where defamatory materials is posted, and there is threat or continuing unjustifiable harm to the reputation of the plaintiff. The considerations for an interdict were captured in *Manuel v Economic Freedom Fighters and Others*,[789] where a plaintiff had to prove on a balance of probabilities that the respondent will publish or continue to publish defamatory allegations concerning him and there will not be valid defence for the defendant, and that the applicant will be prejudiced if the interdict is not allowed, with no further available remedy.

An interdict was also granted in the *Dutch Reformed Church v Rayan Sooknunan*,[790] where defamatory allegations were published by the defendant about the plaintiff on the defendant's Facebook page. The court granted the interdict from 'uttering, stating, writing,

[786]S Maharaj 'Keep your Tweets twibel free' 1 May 2015 Available at *http://www.derebus.org.za/keep-your-tweets-twibel- free/,* (Accessed on 28 April 2020) quoting Pierre de Vos posted on his blog 'Constitutionally Speaking' (Pierre de Vos 'Defamation and social media: We have moved on from Jane Austen' 27-2-2013 (*http://constitutionallyspeaking.co.za*.

[787] *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 (4) SA 747 (A) 768G.

[788] *Moyo v Muleya & Others* 2001 (1) ZLR 251 (H).

[789] *Manuel v Freedom Fighters and Others* 2019 (5) SA 210 (GJ).

[790] *Dutch Reformed Church v Rayan Sooknunan* 2012 SA (GSJ).

publishing or in any other manner or mode' making defamatory allegations against the plaintiff. In *Heroldt v Wills*,[791] Willis J issued an interdict ordering the plaintiff to remove the defamatory posting from the Facebook page. The court was of the opinion that an interdict was a suitable remedy in the circumstances since 'it would resolve the issue without the needless expense, drama, trauma and delay that are likely to accompany an action for damages in a case such as this'.

The right of reply is available to minimise the damage done. The right of reply is inexpensive and prompt and efficient way of correcting defamatory statements that appear in the in the media. This could now also be extended to online publication, where social media users can immediately, without further harm, correct their statements and render an appropriate apology. An apology, *amende honourable*, had fallen into disuse in South African jurisprudence. It was revived in *Mineworkers Investment Co (Pty) Ltd v Modibane*[792] where an alternative remedy claimed by the plaintiff was in the form of an apology, or the *amende honourable. Scholars*[793] *argue that the* remedy is entirely consonant with the 'spirit, purport and objects' of the Bill of Rights referred to in the South African Constitution.[794]

5.5.6 Quantification of Damages

Under current South African law, a complete, unconditional and speedy retraction and apology be a mitigating factor in the assessment of damages. The success of a retraction and apology depends on the defendant's willingness to retract and apologise and the plaintiff's willingness to accept such retraction and apology, and this will also apply to online publications. The quantification of damages does not follow the higher figures awarded in the UK and US jurisdictions. The damages are meant to provide solace to an injured party and are not considered a road to riches. In *Mogale and Others v Selma* in a matter where two million rands in damages was claimed, the court held that:

> 'The determination of quantum in respect of sentimental damages *is* inherently difficult and requires the exercise of discretion, more properly called a value judgment, by the

[791] *Heroldt v Wills* 2013 (2) SA 530 (GSJ).
[792] *Mineworkers Investment Co (Pty) Ltd v Modibane* 2002 (6) SA 512 (W).
[793] G Feltoe *A Guide to the Zimbabwean Law of Delict* (2018).
[794] Constitution of the Republic of South Africa Act 108 of 1996, section 39 (2).

judicial officer concerned. Right-minded persons can fairly disagree on what the correct measure in any given case is...' [795]

The Supreme Court, further proceeded to add that 'awards in defamation cases do not serve a punitive function and are, generally, not generous.'[796] In the matter of *Tsedu and Others v Lekota and Another*,[797] *the Supreme* Court held that that monetary compensation for harm of this nature is not capable of being determined by an empirical measure. However, in determining quantum in respect of defamation, it was held in *Muller v SA Associated Newspapers Ltd*[798] that the court must have regard to:

a. the seriousness of the defamation.
b. the nature and extent of publication.
c. the reputation, character and conduct of the plaintiff.
d. the motives and conduct of the defendant.

In the matter of *Esso Standard SA (Pty) Ltd v Katz,*[799] the Appellate Court held that: 'It has been accepted that in some type of cases damages are difficult to estimate and the fact that they cannot be assessed with certainty or precision will not relieve the wrongdoer of the necessity of paying damages for his breach.'[800]

The Internet should also be considered a factor in the quantification of damages. The extent of the newspaper's circulation and reach is important in the consideration for award of damages. The greater the readership, the greater the extent of the harm. In *Manyi v Dhlamini*,[801] the court held that the defamatory words were intended to violate the plaintiff's right to reputation, self-worth, dignity and privacy and such publication on WhatsApp, which is a social media platform had the potential to reach a wide spectrum of readership. However, in the case of *Tsichlas v Touch Line Media (Pty) Ltd*,[802] it was held that national or geographic boundaries are irrelevant when dealing with the Internet and electronic communications. In Zimbabwe, in

[795] *Mogale v Seima* 2008 5 SA 637 (SCA).
[796] Ibid.
[797] *Tsedu and Others v Lekota and Another* 2009 (4) SA 372 (SCA).
[798] *Muller v SA Associated Newspapers Ltd* 1972 (2) SA 589 (CPD) at 595.
[799] *Esso Standard SA (Pty) Ltd v Katz* 1981 (1) SA 964 (A).
[800] Ibid.
[801] *Manyi v Dhlamini* Unreported judgment case no [2018] ZAGPPHC 563 of 18 July 2018.
[802] *Tsichlas v Touch Line Media (Pty) Ltd* 2004 (2) SA 112 (W).

Mugwadi v Nhari & Anor[803] a Zimbabwean case, the Internet reach of the paper was considered a factor in the assessment of damages.

The courts cannot afford to overlook the effect of the Internet in publication. There are issues beyond the reputation of the plaintiff that are at stake. Future job prospects can be harmed, if a potential employer assess old untrue and defamatory content about a prospective employee. Deletion of material on internet is not permanent in some instances. Once information is posted on WhatsApp, it can be copied and reposted in picture to different individuals. It becomes permanent, and the original poster may never have access to his original material, even if he deleted the original posting. A retraction and apology does not help completely vindicate the name of the plaintiff. However, scholars are of the view that court ordered apologies can act as a deterrent and shame the unruly defendants. Given the prevalence of online defamation, they can be an effective remedy. Vandenbussche argues that: 'court-ordered apologies deserve a place among the available non-pecuniary remedies, because of their distinctive features. First, apologies have a shaming function, which allows courts to impose stigma on defendants. Second, apologies serve an educative function, which enables courts to reinforce social norms. This central claim does not imply that apologies should be available as the "one and only" form of specific relief.'[804]

5.6. Conclusion

This chapter sought to provide a comparative analysis of three jurisdictions on how they legislatively adopted and adapted to developments in cyberspace. The UK and US approach was a combination of statutory and common law developments. The UK regulative interventions were mainly statutory and were comprehensive, while in the US it was a combination of both common law and statute. South Africa is still heavily reliant upon common law, despite minor statutory interventions to address the problems associated with the liability of ISPs.

[803] *Mugwadi v Nhari & Another* 2001 (1) ZLR 36 (H).

[804] W Vandenbussche 'Rethinking Non-Pecuniary Remedies for Defamation: The Case for Court-Ordered Apologies' 19 Jun 2019 *Institute for Civil Procedure, KU Leuven* Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3236766, (Accessed 28 April 2020).

The major regulatory intervention in the three jurisdictions dealt with the liability of ISPs. The principle of functional equivalence appears desirable in addressing the role of ISPs, which is deemed analogous to that of distributors. There is consensus that ISPs should not be held liable for defamatory content hosted on their platforms. However, there is a responsibility to address defamatory content once an aggrieved party raises concerns, with various options emerging which relate to either removal or deletion of the offensive content, and or disclosure of the originators of the material upon a delivery of a court order.

The single publication claim consideration seems a more favourable option to multiple claims to avoid creating huge unnecessary burden on the ISPs, who will have to respond to a multiplicity of claims over the same cause of action. A limitation period within which a claim could be made was proposed. Limitation rule is designed to safeguard evidence and instigate prompt litigation and resolution of disputes. In the UK, the Neill Committee, drew attention to the difficulties defendants faced in defending proceedings after several years: 'Memories fade. Journalists and their sources scatter and become, not infrequently, untraceable. Notes and other records are retained only for short periods, not least because of limitations on storage.'[805]

The court's jurisdictional challenges were major, and the appropriate approach appeared to have been the effect test, and where the online material was downloaded to found jurisdiction. Different states would however adopt different approaches. The *Gutnick* case, despite being a controversial decision, appears to have set a precedent, in consideration of where the material was downloaded to found jurisdiction.

The next chapter will seek to condense the research gathered and make appropriate recommendations on how Zimbabwe can adapt to the cyberspace developments, focusing attention to emerging international best practice, statutory interventions in the other jurisdictions and common law developments.

[805] The United Kingdom: Supreme Court Procedure Committee (1991) *Report on Practice and Procedure in Defamation* at 81.

CHAPTER SIX

RECOMMENDATIONS AND CONCLUSION

6.1 INTRODUCTION

This chapter is the culmination of the research around how Zimbabwe can adapt and adopt legislation based on international best practice in the form of statutory law relaxations and or interventions to plug the lacuna created by the digital era. Three international model laws, particularly the UNCITRAL Model Law on Electronic Commerce[806] the Budapest Convention[807] and SADC Model Law on Electronic Transactions and E-commerce,[808] have been used as a guiding torch to illuminate the sphere of cyberspace, and interrogate how laws can be harmonised, to create certainty and uniformity. The research has analysed jurisdictions of three countries in different continents to understand how they have adjusted and or conformed to the various areas of cyber defamation for possible intervention.

Scholars have observed that:

> 'legislation and the legislative processes for most nations remain even in the 21st Century a slow and painful process. This is a challenge to the implementation of the necessary enabling legal environment required for effective international cooperation in investigation and prosecution of cybercrime, particularly given the global and exponential growth of cybercrime.' [809]

This quote would also relate to online defamation, as much as it would do to cyber-crime. The economic status of developed countries gives them the leeway to develop technology, which is both beneficial and harmful to developing countries. The developed countries seem to have the technological capacity to address the complex problems associated with the digital era, and

[806]UNCITRAL Model Law on Electronic Commerce Guide to Enactment with 1996 with additional Article 5 as adopted in 1998, Available at *https://www.uncitral.org/pdf/english/texts/electcom/05-89450_Ebook.pdf,* [Accessed 8 February 2021].

[807] Budapest Convention: Details of Treaty No.185 Available at *https://www.coe.int/en/web/conventions/full-list/ /conventions/treaty/185,* [Accessed 8 February 2021].

[808] Electronic Transactions and Electronic Commerce: Southern African Development Community (SADC) Model Law Available at *https://www.itu.int/en/ITU-D/Projects/ITU-EC-ACP/HIPSSA/Documents/FINAL%20DOCUMENTS/FINAL%20DOCS%20ENGLISH/sadc_model_law_e-transactions.pdf,* [Accessed 8 February 2021].

[809]Cybercrime Model Laws, Project Cybercrime@Octopus (2014) Strasbourg, France Version 9 Available at https://rm.coe.int/1680303ee1 (Accessed on 26 April 2020).

they can easily legislate accordingly. True to the African proverb that is it takes a village to raise a child, developing countries, still at their technological infancy will require active collaboration of the whole word to confront the problems associated with cyberspace. Regional bodies, in the form of the world's various geographic regions and their economic and legal systems can play a complimentary but effective role.

The UNCTRAL Model Law, Budapest Convention and SADC Model law are relevant and directly applicable to Zimbabwe's confrontation of cyberdefamation, this is despite the different economic and legal systems from which they emanate. The Budapest Convention is the closest instrument to a global treaty on cyber-crime and thus could provide a useful guideline to dealing with cyberdefamation. To achieve broader harmonization beyond the African or SADC regions, it is recommended that SADC countries must strive to first harmonize their legislations with its standards.

This chapter will seek to provide recommendations arising from the research which are compatible with and can conform to the Zimbabwean situation. Key areas have been identified from the preceding chapters, that require statutory and common law intervention.

6.2. Summary of the Key Areas

The legislative precincts that have been identified for possible interventions relate to defining publication to found jurisdiction, jurisdiction to adjudicate and prescribe, the single and multiple publication rule, anonymity, relevance of constitutional law interventions to resolve matters that can be dealt with by common law, common law adaption and adoption, and liability of Internet Service Providers. Despite lack of uniformity in the legislative approach of different countries, there is some notable and plausible convergence on a number of areas. The dangers inherent in states not taking pre-emptive legislative interventions are in insurmountable. While actions are necessary, what matters most is how to tackle the problem given the legal convolutions connected with the cyberspace.

6.3. Recommendations

The recommendations are not conclusive, given the constant technological shifts in the cyberspace there is a need for constant review of the legislation. A combination of both

statutory and common law developments are necessary in application and the relevance of each would depend on the circumstances and complexities of the matter to be resolved. Regulatory harmonisation of laws promotes collective approaches to shared problems. With this harmonised approach comes internationally acceptable best practice, from which Zimbabwe can craft its own laws, enabling the effective regulation of online defamation. There is however a danger for multiple regional-level model laws that could create different harmonization standards with the potential to frustrate efforts at global cooperation.

6.3.1. Regional and International Perspective

6.3.1.1. UNCITRAL and Budapest Convention

The UNICITRAL Model Law was the first important step towards harmonisation of model laws. While its approach is geared towards cybercrime, it has legislative offshoots that could be planted within the precincts of cyber defamation. The UNCITRAL Model Law has drawn vital principles of functional equivalence and technological neutrality. These could help align the development of regulatory framework of cyber defamation with international best practice.

However, there is a need for a comprehensive international treaty that departs from the rhetoric around criminal liability in the digital space, to private international law, dealing with liability for online defamation. A harmonised framework will be an important starting point. A treaty has an enhanced binding legal force as compared to a model law, which ordinarily serves the purposes of copying and pasting into a developing domestic law.

Corporation and involvement of all states will be crucial for recognition and acceptability of the resultant document. Each state concerns should be taken into consideration to avoid non-state acquiescence to the resultant document. The ultimate document would create a platform and opportunity for Zimbabwe to prepare new laws or help in adjustments of current laws.

However, Zimbabwe in adopting international best practice, should be alive to the principles of ‘technology neutrality’ in online regulation, which principally regulates the effects of a person’s conduct instead of the means they use to achieve the effects. This invariably affirms that a developing law should complement online and offline equivalence

and not impose technology or discriminate between technologies; and that it should encourage the development of new technologies and sustain technology developments. This is important because it has been observed that 'while African economies are growing in size, they are not growing sufficiently in technological, process or governance complexity, or in the enhancement of the technical capabilities of people and institutions.'[810] Greater mastery is required in law-making and rule-making navigating the complex cyber space.

6.3.1.2 SADC Model Law

Observations have been made that the SADC's digital ecosystem provides a regulatory 'environment characterised by uncertainty, unpredictability and discontinuity, one that is in need of complex adaptive responses.'[811] At regional level, there is a need to ensure that the member states adapt to the complex digital era demands. While the SADLC Model Law is an ideal approach towards harmonisation of the laws in cyberspace, sole attention has been dedicated towards crime prevention and not the hazards associated with online defamation. Private law and criminal law are of equal significance. The approach should be simultaneous so as to address the lacuna created by the advent of the digital era in both public and private law domains. There is therefore need for regional regulatory harmonisation of cyber defamation laws. It appears there is a myriad of Information Communication Technologies regulators, which obviously demand the need for a requirement to synchronise mingled regulatory agendas. It will however be important to have the ICTs self-regulating.

SADC should create a fund for training the judiciary, and promoting research geared towards the development of cyber online defamation laws. The challenge in developing legislation is actually more apparent in developing countries that has no technical knowhow to craft electronic related legislation that requires particular scarce expertise.

An effective online centered infrastructure development is crucial, to acquaint the judiciary and prosecutors with digital developments. This would promote technical innovation and inspire confidence in the development and adjustment of common law. Failure to address the emerging problems could widen the digital divide between public sector and well-resourced private sector, and between African countries, including Zimbabwe and the rest of the world.

[810]L Abrahams 'Regulatory Imperatives for the Future of SADC's "Digital Complexity Ecosystem"' (2017) *AJIC Issue* 20 .
[811]Ibid.

6.4. Computer Curriculum Educational Development

There is lack of information on the dangers associated with the social media, particularly posting of unfounded material, which often has an insidious reputational damaging effect. While computer studies are taken as a course at primary, secondary and tertiary education, part of the curriculum ought to be dedicated towards propagating inherent dangers associated with careless posting of harmful reputational material. Some of the lawsuits arising from defamatory material, demonstrate ignorance of law and the social implications associated with the publication on the part of the defendants. Scholars have also observed that:

> 'what some users of Facebook believed to be a platform for self-expression without legal restraint is clearly subject to legal rules regardless of whether the public agrees with that or not. Users of Facebook must now be exceedingly careful not only about what they post but also with regards to the posts on which they may be 'tagged' or which they 'like', as there is clearly no unfettered freedom of expression on social networks in South Africa.'[812]

6.5. Statutory and Constitutional Law Interventions

Zimbabwe and South Africa are reluctant to use statutory law interventions to address defamation. The argument is that common law is sufficient in dealing with defamation. However, the advent of the Internet presents overwhelming challenges which can leave the judiciary gasping for solutions to confront emerging complexities presented by its intricate nature. The UK has had to craft the Defamation Act of 1996[813] and 2013[814] to address the multifaceted challenges. The US drafted the Communications Decency Act of 1996,[815] while South Africa drafted the Electronic Commerce (EC Directive) Regulations, 2002 to specifically deal with liabilities of ISPs.

For South Africa this is a piecemeal statutory approach. The complex nature of cyberspace cannot be left to common law alone. It is important to note that the initial reactions

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[812] A Roos and M Slabbert 'Defamation on Facebook: Isparta v Richter 2013 6 SA 529 (GP)' (2014) 17(6) *PER/PELJ*.

[813] Defamation Act, 1996, Available at *https://www.legislation.gov.uk/ukpga/1996/31/contents*, [Accessed on 8 February 2021].

[814] Defamation Act 2013, Available at *https://www.legislation.gov.uk/ukpga/2013/26/contents/enacted*, [Accessed on 8 February 2021].

[815] Communications Decency Act, USA. Available at *https://www.britannica.com/topic/Communications-Decency-Act*, (Accessed 8 February 2021).

by regional and international institutions was to craft model laws that dealt with criminal liabilities arising from the Internet. The civil component of the law, as earlier indicated, was thus left undeveloped. The need for harmonised legislative framework, should help present a coherent and uniform regulatory framework that can provide effective legal remedies. Common law interventions may not be sufficient, as technological advancements are frequent and the law may not keep pace. A combination of both common law and statutory intervention can help present effective and corrective regulatory resolutions. Which makes the observations made by Desai important:

> 'A possibility exists that new forms of online defamation will emerge with evolving technology and our courts may not be prepared to respond to this effectively. The proficiency and capability of existing laws to keep abreast of changes within the global internet network may eventually be exposed, as many of the existing laws have not been designed to deal with modern technology. Challenges of jurisdiction, anonymity and dissemination of information, amongst others may continue to escalate. The responsibility of our courts to decode the technical characteristics of the internet and formulate well-settled precedents cannot be underestimated.'[816]

It appears the liability of ISPs has been statutorily and adequately addressed in the three jurisdictions. Zimbabwe, paying particular attention to international best practice functional equivalence and technological neutrality principles, could craft a statute to address the liability of ISPs to online defamation. The common consistent approach has been to equate ISPs role as that of distributors, with no liability, except in circumstances where negligence can be proved. However, more on ISPs will be discussed in detail below.

6.6. Publication of Press Statements and Public Events

There have been statutory interventions in both the UK[817] and United States[818] over statements made by public officers at public gatherings and press conferences. If the identities of the public officers are ascertainable and the matter is of public interest, the defence of publication of matters arising from press conferences, public discussions and or political rallies should be

[816] Iyer D 'An Analytical Look Into the Concept of Online Defamation in South Africa' (2018) 32(2) *Speculum juris.*

[817] Schedule 1 Defamation Act of 1996.

[818] First Amendment and Civil Code section 47, subdivision (d) permitted defendants to publish a "fair and true report" of the legal proceedings. See also *McClatchy Newspapers Inc. v. Superior Court* (1987) 189 Cal.App.3d 961, 975.)

sufficiently afforded. Liability against Modus Publication's[819] financial Gazette journalists, that arose following the publication of a press conference event, addressed by a famous opposition politician Edgar Tekere, against a sitting government minister of the Zimbabwe African National Union (Patriotic Front) party, Eddison Zvobgo, has a chilling effect on press freedom. Liability could be higher in the advent of the internet and increase the quantification for damages. As such, statutory intervention like what happened in the UK and US would offer sufficient protection to Zimbabwean journalists, who are at the potential mercy of higher damages due to the geographical reach and extent of internet publication. The statutory media law reform would be taking the form of some enabling legislation, to support the broadened Bill of Rights that now specifically protects press freedom under section 61(2) of the Zimbabwe Constitution of 2013. It should take into the consideration the growth of the internet, and must further insulate journalists against arbitrary arrests,[820] and or civil litigation persecution for publication of fair and accurate reports. This could be done by setting the threshold to be similar to that which is created under the Defamation Act of 2013, which specifically provides that serious harm must be established before litigation can be instituted.[821]

6.7. Role of Internet Service Providers

As indicated in the preceding paragraph 6.3.2, the liability of ISPs was statutorily removed from online defamatory postings, as their role is that of intermediaries. In South Africa the liability of ISPs is limited by the provisions of Chapter XI of the Electronic Communications and Transactions Act,[822] which differentiates between service providers that are conduits, to those that cache information and those that act as hosts. Under certain prescribed conditions, the internet service providers will not be held liable if a third party exploits their platforms to distribute a defamatory publication.

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[819] *Zvobgo v Modus Publications* (Pvt) Ltd 1995 (2) ZLR 96 (H).

[820] Columbus Mavhunga Critics Decry Zimbabwe's Press Freedom Failures, (Available at *https://www.voanews.com/press-freedom/critics-decry-zimbabwes-press-freedom-failures,* (Accessed 10 February 2021).

[821] Defamation Act 2013, section 1.

(1)A statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant.

(2) For the purposes of this section, harm to the reputation of a body that trades for profit is not "serious harm" unless it has caused or is likely to cause the body serious financial loss.

[822] The Electronic Communications and Transactions Act 25 of 2002, available at *https://www.gov.za/sites/default/files/gcis_document/201409/a25-02.pdf,* (Accessed on 8 February 2021).

Jurisdictional issues can arise on whether the plaintiff can make an application from Zimbabwe compelling Facebook to remove defamatory material. There is now a need to craft legislation that has an extra-territorial effect. The current cyber security and data protection bill in Zimbabwe, does not address the online defamation challenges presented by the Internet. The bill is more public law centered, with no attempt at addressing the private law sphere. The legislators appear to have left the private law sphere to be developed by common law. Scholars are emphatic that the

> 'relevant legal principle remains unchanged, that is, that an Internet service provider should be not held liable for unknowingly transmitting copyrighted material on behalf of its customers. In principle, it matters not whether the transmission of copyrighted material occurs on a mass scale. In many ways, the Internet service provider is akin to the manufacturer of videocassette recorders. In the same way that legal responsibility lies with the person video-recording copyrighted material, rather than the manufacturer of video-recording equipment, responsibility must lie with the person uploading (or downloading) copyrighted material.'[823]

However, recommendations have been made that ISPs should, *inter alia*, try to limit access to its forum to people with verifiable identities that it can independently track down should litigation arise. There ought to be an identification device for misusers of platforms. Expeditious remedial mechanisms for defamatory material should be readily be availed to avoid costly and lengthy litigation. The remedies could involve retractions or deletions, accompanied by where appropriate an apology to the offended party.

6.8. Jurisdiction

Jurisdictional challenges are some of the problematic offshoots presented by the digital era. Scholars have pointed out that 'unless it is conceived of as an international space, cyberspace takes all of the traditional principles of conflicts-of-law and reduces them to absurdity.'[824] The Internet is ubiquitous. States demanding sovereignty guarantees have been outsmarted by the digital era. Scholars have noted that 'if sovereignty is the capacity to exercise supreme authority over a territory, the Internet is a direct challenge to the territoriality of law.'[825] While the

[823]Saadat, 'Jurisdiction and the Internet after Gutnick and Yahoo!' (2005) *The Journal of Information, Law and Technology (JILT)*, available, *<http://www2.warwick.ac.uk/fac/soc/law2/elj/jilt/2005_1/saadat/>*, [Accessed 27 April 2020].

[824] D Menthe 'Jurisdiction in Cyberspace: A Theory of International Spaces' (1998) 4 *Mich. Telecomm. Tech. L. Rev* 69.

[825] W Kleinwächter 'Internet Policy Making Internet & Gesellschaft Collaboratory' (2013). Available at URN: https://nbn-resolving.de/urn:nbn:de:kobv:109-1-9101250

immediate resort by the states have been to shut down the social media to crush dissent, technology has found ways to mutate and unleash further state security challenges. The international model law could be harmonised and partly interpreted to deal with over extra-territorial disputes arising from online postings. The aspects of inter-state cooperation and universally aligned enforcement mechanisms could be drafted to deal with extra-territorial disputes in private law, which could be carefully juxtaposed against public model law considerations dealing with criminal liability in cyberspace.

The model law could interpret the underlying State sovereignty issues, without distorting the principles underlying technological neutrality. Technology has no respect for geographical boundaries and statehood.

The Court, in responding to jurisdictional issues have applied the effect test, over and above the common law jurisdictional issues related to jurisdiction to prescribe, adjudicate and to enforce. There are enforcement limitations by the state in compelling a foreign defendant to appear before the court and defend a claim. Jurisdictional laws are however not uniform. The service of a foreign writ is illegal in some jurisdictions, and defendants even if they have been properly served outside, they may still default appearance. As suggested earlier above, the laws could be improved to have an extra territorial effect, with equal reciprocation from different jurisdiction under harmonised model laws that are certain rational and coherent.

Courts have applied different tests, like forum test, effect test and *forum non conveniens*, to exercise found jurisdiction. However, legislating a problem is the primary responsibility of Zimbabwe, before paying particular attention to and juxtaposing against international model laws. National laws must be allowed to develop and flourish first, given the diverse cultural considerations in the world because they guide national policy considerations. Thereafter, the development of domestic laws in conjunction with harmonized international law would be imperative. Zimbabwe need to compare any potential bill to international model laws to adopt best practice and for uniformity purposes.

6.9. Single Publication Rule

The three jurisdictions referred in the preceding chapter have largely embraced single publication rule to website libel cases. Multiple publications rule has a chilling effect on freedom of expression and can pose a serious damaging consequence to free press and expression. It can have a negative pecuniary effect to business. Publishers can close shop, under the weight of endless financially oppressive litigation. The UK and US have made statutory interventions to protect publishers under the single publication rule.

Zimbabwe's statutory framework[826] and common law position[827] is that it subscribes to single publication. It is recommended to retain the single publication rule to safeguard the publishing industry and promote finality to litigation as principle. Accompanying the single publication rule, should be limitation period rule to institute an action. It has been argued that it is unfair to allow actions to be brought against newspapers a year after their original online publication. Where it can be proven that the plaintiff was aware or ought to have been aware of the cause of action and did nothing to persecute his case within a reasonable period of time, the court should be inclined to deny hearing the case. Definition of 'reasonable time' is an interpretation to be defined under common law. Where old matters are either revived or allowed to be prosecuted after a lengthy period of time, it will be harmful to prosecution because in most instances' witnesses would no longer be available.

Zimbabwean courts are recommended to follow the single publication rule for website libel. Litigation could be allowed to be instituted, if the original article is republished, with new defamatory alterations that can potentially give rise to a new cause of action. Liability could also lie on any defendant, who republishes an original defamatory material. The traditional common law principles applicable to republication and liability should apply. Such an approach would harmonize website libel approach with traditional libel law.

6.10. Summary

Reputational damage can be highly insidious, painful, cause anxiety and patrimonial loss. While no amount of money can vindicate the name of the plaintiff, there is need for scope for redress of the victims. The challenges for amends have become difficult because of the

[826]Damages (Apportionment Assessment) Act [Chapter 8:06].
[827]*Mashamhanda v Mpofu* and others [1999] JOL 4417 (ZH).

complexities surrounding the cyber space. It is hoped that artificial and natural persons can find solace in the development of a comprehensive legislative framework that would plug the loopholes wrought by the Internet. While litigants could be encouraged to be 'less thin-skinned about slings and arrows traded on computerised networks'[828] prospective legislative interventions should deal with extreme violations of human dignity, reputational considerations and privacy under common law. While no award of monetary damages would eliminate the plaintiff's loss of reputation, and as such 'we should not curtail the possible options available to us to vindicate one's reputation and effect a workable balance between protection of reputation and free speech.'[829] However, it's been observed that: 'barriers, inequities and injustices … will continue to grow and evolve in a virtual society.'[830]

[828] S Nel 'Defamation on the Internet and other computer networks' (1997) *The Comparative and International Law Journal of Southern Africa.15*4–174. Available at http://www.jstor.org/stable/23250178.

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